No.

In the Supreme Court of the United States

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., PETITIONERS

v.

ROBERT M. NELSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-56424

ROBERT M. NELSON; WILLIAM BRUCE BANERDT; JULIA BELL; JOSETTE BELLAN; DENNIS V. BYRNES; GEORGE CARLISLE; KENT ROBERT CROSSIN; LARRY R. D'ADDARIO; RILEY M. DUREN; PETER R. EISENHARDT; SUSAN D.J. FOSTER; MATTHEW P. GOLOMBEK; VAROUJAN GORJIAN; ZAREH GORJIAN; ROBERT J. HAW; JAMES KULLECK; SHARLON L. LAUBACH; CHRISTIAN A. LINDENSMITH; AMANDA MAINZER; SCOTT MAXWELL; TIMOTHY P. MCELRATH; SUSAN PARADISE; KONSTANTIN PENANEN; CELESTE M. SATTER; PETER M.B. SHAMES; AMY SNYDER HALE; WILLIAM JOHN WALKER; PAUL R. WEISSMAN, PLAINTIFFS-APPELLANTS

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, AN AGENCY OF THE UNITED STATES; MICHAEL GRIFFIN, DIRECTOR OF NASA, IN HIS OFFICIAL CAPACITY ONLY; UNITED STATES DEPARTMENT OF COMMERCE; CARLOS M. GUTIERREZ, SECRETARY OF COMMERCE, IN HIS OFFICIAL CAPACITY ONLY; CALIFORNIA INSTITUTE OF TECHNOLOGY, DEFENDANTS-APPELLEES

Argued and Submitted: Dec. 5, 2007
Filed: June 20, 2008

Before: DAVID R. THOMPSON and KIM MCLANE WARDLAW, Circuit Judges, and EDWARD C. REED, JR.,* District Judge.

ORDER

Our prior opinion filed on January 11, 2008, and reported at 512 F.3d 1134 is vacated concurrent with the filing of a new opinion today.

The petition for panel rehearing and the petition for rehearing en banc are denied as moot. The parties may file new petitions for rehearing and rehearing en banc in accordance with the Federal Rules of Appellate Procedure.

IT IS SO ORDERED.

OPINION

WARDLAW, Circuit Judge:

The named appellants in this action ("Appellants") are scientists, engineers, and administrative support personnel at the Jet Propulsion Laboratory ("JPL"), a research laboratory run jointly by the National Aeronautics and Space Administration ("NASA") and the California Institute of Technology ("Caltech"). Appellants sued NASA, Caltech, and the Department of Commerce (collectively "Appellees"), challenging NASA's re-

* The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

cently adopted requirement that "low risk" contract employees like themselves submit to in-depth background investigations. The district court denied Appellants' request for a preliminary injunction, finding they were unlikely to succeed on the merits and unable to demonstrate irreparable harm. Because Appellants raise serious legal and constitutional questions and because the balance of hardships tips sharply in their favor, we reverse and remand.

I

JPL is located on federally owned land, but operated entirely by Caltech pursuant to a contract with NASA. Like all JPL personnel, Appellants are employed by Caltech, not the government. Appellants are designated by the government as "low risk" contract employees. They do not work with classified material.

Appellants contest NASA's newly instated procedures requiring "low risk" JPL personnel to yield to broad background investigations as a condition of retaining access to JPL's facilities. NASA's new policy requires that every JPL employee undergo a National Agency Check with Inquiries (NACI), the same background investigation required of government civil service employees, before he or she can obtain an identification badge needed for access to JPL's facilities. The NACI investigation requires the applicant to complete and submit Standard Form 85 (SF 85), which asks for (1) background information, including residential, educational, employment, and military histories; (2) the names of three references that "know you well;" and (3) disclosure of any illegal drug use, possession, supply, or manufacture within the past year, along with the nature

and circumstances of any such activities and any treatment or counseling received. This information is then checked against four government databases: (1) Security/Suitability Investigations Index; (2) the Defense Clearance and Investigation Index; (3) the FBI Name Check; and (4) the FBI National Criminal History Fingerprint Check. Finally, SF 85 requires the applicant to sign an "Authorization for Release of Information" that authorizes the government to collect "any information relating to [his or her] activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." The information sought "may include, but is not limited to, [the applicant's] academic, residential, achievement, performance, attendance, disciplinary, employment history, and criminal history record information."[1] The record is vague as to the exact extent to and manner in which the government will seek this information, but it is undisputed that each of the applicants' references, employers, and landlords will be sent an "Investigative Request for Personal Information" (Form 42), which asks whether the recipient has "any reason to question [the applicant's] honesty or trustworthiness" or has "any adverse information about [the applicant's] employment, residence, or activities" concerning "violations of law," "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," or "other matters." The recipient is asked to explain any adverse information noted on the form. Once the information has been collected, NASA and the federal Office of Personnel Man-

[1] The form also notes that "for some information, a separate specific release will be needed," but does not explain what types of information will require a separate release.

agement determine whether the employee is "suitable" for continued access to NASA's facilities, though the exact mechanics of this suitability determination are in dispute.[2]

Since it was first created in 1958, NASA, like all other federal agencies, has conducted NACI investigations of its civil servant employees but not of its contract employees. Around the year 2000, however, NASA "determined that the incomplete screening of contractor employees posed a security vulnerability for the agency" and began to consider requiring NACI investigations for contract employees as well. In November 2005, revisions to NASA's Security Program Procedural Requirements imposed the same baseline NACI investigation for all employees, civil servant or contractor. These changes were not made applicable to JPL employees until January 29, 2007, when NASA modified its contract with Caltech to include the requirement. Caltech vigorously opposed the change, but NASA invoked its con-

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[2] Appellants claim that the factors used in the suitability determination were set forth in a document, temporarily posted on JPL's internal website, labeled the "Issue Characterization Chart." The document identifies within categories designated "A" through "D" "[i]nfrequent, irregular, but deliberate delinquency in meeting financial obligations," "[p]attern of irresponsibility as reflected in . . . credit history," "carnal knowledge," "sodomy," "incest," "abusive language," "unlawful assembly," "attitude," "homosexuality . . . when indications are present of possible susceptibility to coercion or blackmail," "physical health issues," "mental, emotional, psychological, or psychiatric issues," "issues . . . that relate to an associate of the person under investigation," and "issues . . . that relate to a relative of the person under investigation." NASA neither concedes nor denies that these factors are considered as part of its suitability analysis; instead, it suggests that Appellants have not sufficiently proved that such factors will play a role in any individual case.

tractual right to unilaterally modify the contract and directed Caltech to comply immediately with the modifications. Caltech subsequently adopted a policy—not required by NASA—that all JPL employees who did not successfully complete the NACI process so as to receive a federal identification badge would be deemed to have voluntarily resigned their Caltech employment.

On August 30, 2007, Appellants filed suit alleging, both individually and on behalf of the class of JPL employees in non-sensitive or "low risk" positions, that NASA's newly imposed background investigations are unlawful. Appellants bring three primary claims: (1) NASA and the Department of Commerce (collectively "Federal Appellees") violated the Administrative Procedure Act ("APA") by acting without statutory authority in imposing the investigations on contract employees; (2) the investigations constitute unreasonable searches prohibited by the Fourth Amendment; and (3) the investigations violate their constitutional right to informational privacy.

On September 24, 2007, Appellants moved for a preliminary injunction against the new policy on the basis that any JPL worker who failed to submit an SF 85 questionnaire by October 5, 2007, would be summarily terminated. The district court denied Appellants' request. It divided Appellants' claims into two categories—those challenging the SF 85 questionnaire itself and those challenging the grounds upon which an employee might be deemed unsuitable—and found that the challenges to the suitability determination were highly speculative and unripe for judicial review. The court rejected Appellants' APA claim, finding statutory support for the investigations in the National Aeronau-

tics and Space Act of 1958 (the "Space Act"), 42 U.S.C. § 2455(a). The court rejected Appellants' Fourth Amendment argument, holding that a background investigation was not a "search" within the meaning of the Fourth Amendment. Finally, the court found that the SF 85 questionnaire implicated the constitutional right to informational privacy but was narrowly tailored to further the government's legitimate security interest. After concluding that Appellants had little chance of success on the merits, the district court also found that they could not demonstrate irreparable injury because any unlawful denial of access to JPL's facilities could be remedied post hoc through compensatory relief.

On appeal, a motions panel of our court granted a temporary injunction pending a merits determination of the denial of the preliminary injunction. *Nelson v. NASA,* 506 F.3d 713 (9th Cir. 2007). The panel concluded that the information sought by SF 85 and its waiver requirement raised serious privacy issues and questioned whether it was narrowly tailored to meet the government's legitimate interest in ascertaining the identity of its low-risk employees. *Id.* at 716. The panel further found that "[t]he balance of hardships tips sharply in favor of [A]ppellants," who risk losing their jobs pending appeal, whereas there was no exigent reason for performing the NACI investigations during the few months pending appeal given that "it has been more than three years since the Presidential Directive [upon which the government relies] was issued." *Id.* at 716.

II

To obtain preliminary injunctive relief, Appellants must demonstrate either "(1) a likelihood of success on

the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor." *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999). The two prongs are not separate tests but rather "extremes of a single continuum," so "the greater the relative hardship to [the party seeking the preliminary injunction], the less probability of success must be shown." *Id.* (internal quotation marks omitted).

Upon review of the merits of the district court's denial of preliminary injunctive relief, we find ourselves in agreement with the motions panel. Appellants have demonstrated serious questions as to their informational privacy claim, and the balance of hardships tips sharply in their favor. We therefore conclude that the district court abused its discretion in denying Appellants' motion for a preliminary injunction, and we reverse and remand.

A. Standing and Ripeness

The district court found that the justiciability doctrines of ripeness and standing precluded consideration of Appellants' claims, except as they concerned the SF 85 questionnaire and associated waiver. We agree with the district court that Appellants' claims concerning the suitability determination are unripe and unfit for judicial review; however, the district court misconstrued Appellants' informational privacy claim, viewing it as limited to the SF 85 questionnaire alone.

To enforce Article III's limitation of federal jurisdiction to "cases and controversies," plaintiffs must demonstrate both standing and ripeness. To demonstrate standing, a plaintiff "must have suffered an 'injury in

fact'—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal citations and quotation marks omitted). The ripeness doctrine similarly serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies" and requires assessing "'both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Ass'n of Am. Med. Colls. v. United States,* 217 F.3d 770, 779-80 (9th Cir. 2000) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)).

In analyzing justiciability, the district court distilled Appellants' claims into two basic arguments: (1) "that SF 85 is overly broad and intrusive considering the 'low-risk' nature of [appellants'] jobs at JPL" and (2) "that JPL's internal policy, which lists various grounds upon which an employee can be determined unsuitable for employment, is unconstitutional." We agree that challenges to the suitability determination are unripe because the record does not sufficiently establish how the government intends to determine "suitability"—accordingly, any claims are "strictly speculative." We also agree that Appellants have standing to challenge the SF 85 questionnaire, and because "it is undisputed that if [Appellants] do not sign the SF 85 waiver by October 5, 2007," they will "be deemed to have voluntarily resigned," there exists a "concrete injury that is imminent and not hypothetical" and thus ripe for review.

However, the district court overlooked Appellants' challenges to the government *investigation* that will result from the SF 85 requirement that the applicant sign an "authorization for release of information." On its face, this waiver authorizes the government to collect "*any* information . . . from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information" "includ[ing], but . . . not limited to, . . . academic, residential, performance, attendance, disciplinary, employment history, and criminal history record information." (emphasis added). It is uncontested that as a result of this authorization, the government Office of Personnel Management will send out "Investigative Request[s] for Personal Information," Form 42, to references, employers, and landlords. This form seeks highly personal information using an open-ended questioning technique, including asking for "any adverse information" at all or any "additional information which . . . may have a bearing on this person's suitability for government employment." Any harm that results from Form 42's dissemination and the information consequently provided to the government will be concrete and immediate.

Because Federal Appellees freely admit that Form 42 will be used in NASA's background investigations, Appellants have standing to challenge Form 42's distribution and solicitation of private information, and the issues raised in these challenges are ripe for review. The district court erred by excluding Form 42 claims from its analysis of Appellants' likelihood of success on the merits.

B. APA Claim

Appellants first claim that Federal Appellees violated the APA by imposing background investigations on contract employees without any basis in executive order or statute. The district court found that Congress gave NASA the authority to conduct such investigations in the Space Act of 1958, which provides:

> The [NASA] Administrator shall establish such security requirements, restrictions, and safeguards as he deems necessary in the interest of the national security. The Administrator may arrange with the Director of the Office of Personnel Management for the conduct of such security or other personnel investigations of the Administration's officers, employees, and consultants, and its contractors and subcontractors and their officers and employees, actual or prospective, as he deems appropriate. . . .

42 U.S.C. § 2455(a).

Appellants argue that the "security or other personnel investigations" described in the second sentence of § 2455(a) are examples of the "security requirements, restrictions, and safeguards" described in the first sentence and therefore may only be established "as . . . deem[ed] necessary in the interest of the national security." They then argue that this limiting clause must be read in light of *Cole v. Young,* 351 U.S. 536, 76 S. Ct. 861, 100 L. Ed. 1396 (1956), where the Supreme Court interpreted a statute giving certain government officials the power to summarily dismiss employees "when deemed necessary in the interest of the national security." *Id*. at 538, 76 S. Ct. 861 (internal quotation marks omitted). In *Cole,* the Court found it clear "that 'nation-

al security' was not used in the Act in an all-inclusive sense, but was intended to refer only to the protection of 'sensitive' activities" and therefore held that "an employee can be dismissed 'in the interest of the national security' under the Act only if he occupies a 'sensitive' position." *Id.* at 551, 76 S. Ct. 861. Appellants claim that, by using identical limiting language in the Space Act so soon after *Cole,* Congress intended to authorize personnel investigations only of contractors in "sensitive" positions and not of the "low risk" contractors at issue in this case.

We need not resolve whether the reference to the "interest of the national security" in § 2455(a) should be interpreted in light of *Cole,* because we read this limiting language to apply only to the "security requirements, restrictions, and safeguards" described in the first sentence and not to the "personnel investigations" described in the second sentence. The second sentence could plausibly be read as an example of the "security requirements, restrictions, and safeguards" described in the first sentence, but the statute's legislative history strongly suggests that it was instead meant to be a separate and distinct authorization of power. The Conference Report describes the two sentences separately and notes that the Senate version of the bill contained the second sentence but not the first. Conf. Rep. No. 2166 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3160, 3190, 3197-98. This suggests that § 2455(a) provides two distinct authorizations, the latter of which allows the NASA Administrator to arrange for "security and other personnel investigations" of contractors "as he deems appropriate," regardless of whether these investigations are "necessary in the interest of the national security." Because the Space Act appears to grant NASA the stat-

utory authority to require the investigations here at issue, we agree with the district court that Appellants are unlikely to succeed on the merits of their APA claim.[3]

C. Fourth Amendment Claim

We also agree with the district court's conclusion that Appellants are unlikely to succeed on their Fourth Amendment claims, because the government's actions are not likely to be deemed "searches" within the meaning of the Amendment. An action to uncover information is generally considered a "search" if the target of the search has a "reasonable expectation of privacy" in the information being sought, a term of art meaning a "subjective expectation of privacy . . . that society is prepared to recognize as reasonable." *United States v. Diaz-Castaneda,* 494 F.3d 1146, 1151 (9th Cir. 2007) (citing *Katz v. United States,* 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring)). One does not have a "reasonable expectation of privacy" in one's information for Fourth Amendment purposes merely because that information is of a "private" nature; instead, Fourth Amendment protection can evaporate in

[3] To the extent that NASA has authority to require drug tests for current contractors, that authority is spelled out in the Civil Space Employee Testing Act, codified at 42 U.S.C. § 2473c. Congress enacted the Testing Act as part of the National Aeronautics & Space Administration Authorization Act, Fiscal Year 1992, and not as part of the Space Act of 1958. With the Testing Act, Congress gave NASA the power to administer a drug testing program for those employees or contractors responsible for "safety-sensitive, security, or national security functions." *Id.* § 2473c(c)(1)-(2). The "program shall provide for preemployment, reasonable suspicion, random, and post-accident testing for use . . . of alcohol or a controlled substance." *Id.* Moreover, the statute provides that any drug test "shall . . . provide for the confidentiality of test results and medical information of employees." *Id.* § 2473c(f)(7).

any of several ways. *See, e.g., United States v. Miller,* 425 U.S. 435, 443, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) (holding that there is no reasonable expectation of privacy in bank records in part because the information was voluntarily disclosed to the bank). To succeed on their Fourth Amendment claim, therefore, Appellants must demonstrate that either the Form 42 inquiries sent to third parties or the SF 85 questionnaire itself violates a "reasonable expectation of privacy" so as to be considered a "search" within the meaning of the Amendment.

1. Form 42 Inquiries

"What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection," *Katz v. United States,* 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); however, information does not lose Fourth Amendment protection simply because it is conveyed to another party. For example, in *Katz,* FBI agents attached an electronic listening device to the outside of a public telephone booth and recorded the defendant transmitting illegal betting information over the telephone. *Id.* at 348, 88 S. Ct. 507. Even though the booth's occupant had voluntarily conveyed the information in the conversation to the party on the other end of the line, the Court found that he was "surely entitled to assume that the words he utters into the mouthpiece w[ould] not be broadcast to the world," so the covert surveillance was considered a search within the meaning of the Amendment. *Id.* at 352-53, 88 S. Ct. 507.

On the other hand, in *United States v. White,* the Supreme Court held that the electronic surveillance of a conversation between a defendant and a government informant did *not* constitute a "search" for Fourth

Amendment purposes. 401 U.S. 745, 754, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971) (plurality). The Court acknowledged that, as in *Katz,* the speaker likely expected the content of the conversations to be kept private; however, it held as a bright-line rule that the Fourth Amendment "affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" *Id.* at 749, 91 S. Ct. 1122 (quoting *Hoffa v. United States,* 385 U.S. 293, 302, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966)). In *United States v. Miller,* 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976), holding that the government could subpoena private bank records without implicating the Fourth Amendment, the Court extended the bright-line rule to all information knowingly revealed to the government by third parties:

> [T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

Id. at 443, 96 S. Ct. 1619.

In the challenged background investigations, the government will send written Form 42 inquiries to the applicant's acquaintances. Through these inquiries, the third parties may disclose highly personal information about the applicant. As in *White* and *Miller,* the applicant presumably revealed this information to the third party with the understandable expectation that this information would be kept confidential. Nonetheless, these written inquiries appear to fit squarely under

Miller's bright-line rule and therefore cannot be considered "searches" under the Fourth Amendment.[4]

2. SF 85 Questionnaire

The SF 85 questionnaire required of the applicant is also unlikely to be considered a Fourth Amendment "search." Requiring an individual to answer questions may lead to the forced disclosure of information that he or she reasonably expects to keep private. Historically, however, when "the objective is to obtain testimonial rather than physical evidence, the relevant constitutional amendment is not the Fourth but the Fifth." *Greenawalt v. Ind. Dep't of Corr.,* 397 F.3d 587, 591 (7th Cir. 2005) (holding that a psychological examination required for continued government employment was not a search under the Fourth Amendment).

As Judge Posner notes in *Greenawalt,* direct questioning can potentially lead to a far greater invasion of privacy than many of the physical examinations that have in the past been considered Fourth Amendment "searches." *Id.* at 589-90. Nonetheless, applying the Fourth Amendment to such questioning would force the courts to analyze a wide range of novel contexts (e.g., courtroom testimony, police witness interviews, credit checks, and, as here, background checks) under a complex doctrine, with its cumbersome warrant and proba-

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[4] This analysis presupposes that the applicant voluntarily revealed the information to the third party. For example, the Fourth Amendment could still apply if the government actively used third parties to uncover private information. *See United States. v. Walther,* 652 F.2d 788, 791 (9th Cir. 1981) (noting that the Fourth Amendment is implicated when "a private party acts as an 'instrument or agent' of the state in effecting a search or seizure.").

ble cause requirements and their myriad exceptions, that was designed with completely different circumstances in mind. *Id.* at 590-91. Moreover, declining to extend the Fourth Amendment to direct questioning will by no means leave individuals unprotected, as such contexts will remain governed by traditional Fifth and Sixth Amendment interrogation rights, and the right to informational privacy described below. *See id.* at 591-92.

Because neither the written inquiries directed at third parties nor the SF 85 questionnaire directed at the applicants will likely be deemed "searches," Appellants are unlikely to succeed on their Fourth Amendment claims.

D. Informational Privacy Claim

Although the district court correctly found that Appellants were unlikely to succeed on their APA and Fourth Amendment claims, it significantly underestimated the likelihood that Appellants would succeed on their informational privacy claim. These constitutional errors stem in large part from the court's erroneous ripeness ruling; by limiting its analysis to the SF 85 questionnaire, the court failed to consider the most problematic aspect of the government's investigation—the open-ended Form 42 inquiries.

We have repeatedly acknowledged that the Constitution protects an "individual interest in avoiding disclosure of personal matters." *In re Crawford,* 194 F.3d 954, 958 (9th Cir. 1999). This interest covers a wide range of personal matters, including sexual activity, *Thorne v. City of El Segundo,* 726 F.2d 459 (9th Cir. 1983) (holding that questioning police applicant about her prior sexual activity violated her right to informational privacy),

medical information, *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality."), and financial matters, *Crawford*, 194 F.3d at 958 (agreeing that public disclosure of social security numbers may implicate the right to informational privacy in "an era of rampant identity theft"). If the government's actions compel disclosure of private information, it "has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Crawford*, 194 F.3d at 959 (internal quotation marks omitted). We must "balance the government's interest in having or using the information against the individual's interest in denying access," *Doe v. Att'y Gen.*, 941 F.2d 780, 796 (9th Cir. 1991), weighing, among other things:

> "the type of [information] requested, . . . the potential for harm in any subsequent nonconsensual disclosure, . . . the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating towards access."

Id. (quoting *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980)) (alteration in original).

Both the SF 85 questionnaire and the Form 42 written inquiries require the disclosure of personal information and each presents a ripe controversy. Therefore, whereas the district court limited its analysis to the SF 85 questionnaire, we consider the constitutionality of both aspects of the investigation in turn.

1. SF 85 Questionnaire

Appellants concede that most of the questions on the SF 85 form are unproblematic and do not implicate the constitutional right to informational privacy. They do however challenge the constitutionality of one group of questions concerning illegal drugs. The questionnaire asks the applicant:

> In the last year, have you used, possessed, supplied, or manufactured illegal drugs? . . . . If you answered "Yes," provide information relating to the types of substance(s), the nature of the activity, and any other details relating to your involvement with illegal drugs. Include any treatment or counseling received.

The form indicates that "[n]either your truthful response nor information derived from your response will be used as evidence against you in any subsequent criminal proceeding." The district court concluded that the requested information implicated the right to informational privacy, but found that there were "adequate safeguards in place [to deal with these] sensitive questions."

Other courts have been skeptical that questions concerning illegal drug use—much less possession, supply, or manufacture—would even implicate the right to informational privacy. For example, in *Mangels v. Pena*, 789 F.2d 836 (10th Cir. 1986), the Tenth Circuit held that the disclosure of firefighters' past illegal drug use did not violate their informational privacy rights. *Id.* at 839-40. The Court held that "[t]he possession of contraband drugs does not implicate any aspect of personal identity which, under prevailing precedent, is entitled to constitutional protection. . . . Validly enacted drug laws put

citizens on notice that this realm is not a private one." *Id*. at 839 (internal citations omitted). In *National Treasury Employees Union v. U.S. Department of Treasury*, 25 F.3d 237 (5th Cir. 1994), the Fifth Circuit considered a similar form to the SF 85 questionnaire, with almost identical questions concerning illegal drugs, and rejected the applicants' informational privacy claims. The Court raised similar concerns to the Tenth Circuit:

> Today's society has made the bold and unequivocal statement that illegal substance abuse will not be tolerated. The government declared an all-out war on illegal drugs more than a decade ago. . . . Surely anyone who works for the government has a diminished expectation that his drug and alcohol abuse history can be kept secret, given that he works for the very government that has declared war on substance abuse.

Id. at 243. The Court also noted that the plaintiffs in that case were all federal employees in either "High" or "Moderate" risk "public trust" positions, and were thus acutely "aware of [their] employer's elevated expectations in [their] integrity and performance." *Id*. at 244.

Like the Tenth and Fifth Circuits, we are sensitive to the government's interest in uncovering and addressing illegal substance abuse among its employees and contractors, given the public stance it has taken against such abuse. This government interest is undoubtedly relevant to the constitutional balancing inquiry: whether the forced disclosure "would advance a legitimate state interest and [is] narrowly tailored to meet the legitimate interest." *Crawford*, 194 F.3d at 959. We are less convinced, however, that the government's interest should inform the threshold question of whether re-

quested information is sufficiently personal to invoke the constitutional right to privacy. We doubt that the government can strip personal information of constitutional protection simply by criminalizing the underlying conduct—instead, to force disclosure of personal information, the government must at least demonstrate that the disclosure furthers a legitimate state interest. Drug dependance and abuse carries an enormous stigma in our society and "is not generally disclosed by individuals to the public." *Id.* at 958. If we had to reach the issue, therefore, we would be inclined to agree with the district court that SF 85's drug questions reach sensitive issues that implicate the constitutional right to informational privacy.

We do not need to decide this issue, however, because even if the question requiring disclosure of prior drug use, possession, supply, and manufacture does implicate the privacy right, it is narrowly tailored to achieve the government's legitimate interest. As our sister circuits have lucidly explained, the federal government has taken a strong stance in its war on illegal drugs, and this stance would be significantly undermined if its own employees and contractors freely ignored its laws. By requiring applicants to disclose whether they have "used, possessed, supplied, or manufactured illegal drugs" within the past year, and, if so, to explain the "nature of the activity" and "any other details relating to [the applicant's] involvement with illegal drugs," the government has crafted a narrow inquiry designed to limit the disclosure of personal information to that which is necessary to further the government's legitimate interest.

The same cannot be said, however, for requiring applicants to disclose "any treatment or counseling received" for their drug problems. Information relating to medical treatment and psychological counseling fall squarely within the domain protected by the constitutional right to informational privacy. *See Norman-Bloodsaw,* 135 F.3d at 1269; *Doe,* 941 F.2d at 796. The government has not suggested any legitimate interest in requiring the disclosure of such information; indeed, any treatment or counseling received for illegal drug use would presumably *lessen* the government's concerns regarding the underlying activity. Because SF 85 appears to *compel* disclosure of personal medical information for which the government has failed to demonstrate a legitimate state interest, Appellants are likely to succeed on this—albeit narrow—portion of their informational privacy challenge to SF 85.

2. Form 42 Inquiries

The Form 42 written inquiries—omitted from the district court's analysis as a result of its erroneous ripeness holding—are much more problematic. Form 42 solicits "any adverse information" concerning "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," and "other matters." These open-ended questions are designed to elicit a wide range of adverse, private information that "is not generally disclosed by individuals to the public" and therefore seemingly implicate the right to informational privacy. *Crawford,* 194 F.3d at 958.[5]

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[5] The constitutional right to informational privacy is concerned with "the individual interest in avoiding disclosure of personal matters." In determining whether the right applies, our cases have emphasized the

The government suggests that even if the information disclosed in the investigation implicates the right to informational privacy, the scheme must be upheld because the government has taken measures to keep the information from being disclosed to the general public. Although the risk of public disclosure is undoubtedly an important consideration in our analysis, *see Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 790 (9th Cir. 2002), it is only one of many factors that we should consider, *id.* at 789-90 ("[T]he right to 'informational privacy' . . . applies both when an individual chooses

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nature of the information sought—in particular, whether it is sufficiently "personal" to merit protection, *see Crawford*, 194 F.3d at 958; *Doe*, 941 F.2d at 796—rather than on the manner in which the information is sought. The highly personal information that the government seeks to uncover through the Form 42 inquiries is protected by the right to privacy, whether it is obtained from third parties or from the applicant directly.

In this respect, the right to informational privacy differs from the Fourth Amendment, which, as a bright-line rule, "does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities." *Miller*, 425 U.S. at 443, 96 S. Ct. 1619. This principle has occasionally been rephrased as a general holding "that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735, 743-44, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979). We think it is clear, however, that the "legitimate expectation of privacy" described in this context is a term of art used only to define a "search" under the Fourth Amendment, and *Miller* and *Smith* do not preclude an *informational privacy* challenge to government questioning of third parties about highly personal matters. If the constitutional right to informational privacy were limited to cases that involved a Fourth Amendment "search," the two rights would be entirely redundant. Indeed, although the two doctrines often overlap, *see Norman-Bloodsaw*, 135 F.3d at 1269, we have repeatedly found the right to informational privacy implicated in contexts that did not involve a Fourth Amendment "search," *see, e.g., Thorne*, 726 F.2d at 468.

not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public."); *Norman-Bloodsaw,* 135 F.3d at 1269 (noting that a government action can violate the right to privacy without disclosure to third parties); *Doe,* 941 F.2d at 796 (listing, as two factors among many, "'the potential for harm in any subsequent nonconsensual disclosure [and] the adequacy of safeguards to prevent authorized disclosure.'") (quoting *Westinghouse Elec. Corp.,* 638 F.2d at 578). Therefore, although safeguards exist to help prevent disclosure of the applicants' highly sensitive information, Federal Appellees must still demonstrate that the background investigations are justified by legitimate state interests and that Form 42's questions are "narrowly tailored to meet those legitimate interests." *Thorne,* 726 F.2d at 469.

We agree with the government that it has several legitimate reasons for investigating its contractors. NASA has an interest in verifying its contractors' identities to make sure that they are who they say they are, and it has an interest in ensuring the security of the JPL facility so as not to jeopardize the costly investments housed therein. Appellants concede, as they must, that these are legitimate government interests.

The government has failed to demonstrate, however, that Form 42's questions are "narrowly tailored" to meet these legitimate interests. Initially, we note that although NASA has a general interest in keeping the JPL facility secure, there is no specific evidence in the record to suggest that any of the "low risk" JPL personnel pose such a security risk; indeed, NASA appears to designate as "moderate risk" any individual who has the

"opportunity to cause damage to a significant NASA asset or influence the design or implementation [of] a security mechanism designed to protect a significant NASA asset." More importantly, Form 42's broad, open-ended questions appear to range far beyond the scope of the legitimate state interests that the government has proposed. Asking for "*any* adverse information about this person's employment, residence, or activities" may solicit some information relevant to the applicant's identity or security risk, but there are no safeguards in place to limit the disclosures to information relevant to these interests. Instead, the form invites the recipient to reveal *any* negative information of which he or she is aware. It is difficult to see how the vague solicitation of derogatory information concerning the applicant's "general behavior or conduct" and "other matters" could be narrowly tailored to meet *any* legitimate need, much less the specific interests that Federal Appellees have offered to justify the new requirement.

Finally, the context in which the written inquiries are posed further supports Appellants' claim. In *Thorne v. City of El Segundo,* 726 F.2d 459 (9th Cir. 1983), we focused not only on the private nature of questions asked, but also on the lack of standards governing the inquiry. We held that questioning a female police applicant about her past sexual relations with another officer in the department violated her constitutional right to informational privacy, *id.* at 468, finding that many of the questions posed went beyond any relevant lines of questioning, *id.* at 469-70. More importantly, we noted that the city had not set any *standards* for inquiring about the private information. *Id.* at 470. "When the state's questions directly intrude on the core of a person's constitutionally protected privacy and associational inter-

ests . . . , an unbounded, standardless inquiry, even if founded upon a legitimate state interest, cannot withstand the heightened scrutiny with which we must view the state's action." *Id*. In this case, the government's questions stem from SF 85's extremely broad authorization, allowing it "to obtain *any* information" from any source, subject to other releases being necessary only in some vague and unspecified contexts. Federal Appellees have steadfastly refused to provide any standards narrowly tailoring the investigations to the legitimate interests they offer as justification. Given that Form 42's open-ended and highly private questions are authorized by this broad, standardless waiver and do not appear narrowly tailored to any legitimate government interest, the district court erred in finding that Appellants were unlikely to succeed on their informational privacy claim.

E. Balance of Hardships

The balance of hardships tips sharply toward Appellants, who face a stark choice—either violation of their constitutional rights or loss of their jobs. The district court erroneously concluded that Appellants will not suffer any irreparable harm because they could be retroactively compensated for any temporary denial of employment. It is true that "monetary injury is not normally considered irreparable," *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League,* 634 F.2d 1197, 1202 (9th Cir. 1980), and the JPL employees who choose to give up their jobs may later be made whole financially if the policy is struck down. However, in the meantime, there is a substantial risk that a number of employees will not be able to finance such a principled position and so will be coerced into submitting to the allegedly unconstitutional

NACI investigation. Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm. *See Monterey Mech. Co. v. Wilson,* 125 F.3d 702, 715 (9th Cir. 1997). Moreover, the loss of one's job does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages.

On the other side of the balance, NASA has not demonstrated any specific harm that it will face if it is enjoined for the pendency of the adjudication from applying its broad investigatory scheme to "low risk" JPL contract employees, many of whom have worked at the laboratory for decades. As Caltech argues, JPL has successfully functioned without any background investigations since the first contract between NASA and JPL in 1958, so granting injunctive relief would make NASA no worse off than it has ever been. Moreover, an injunction in this case would not affect NASA's ability to investigate JPL personnel in "high risk" or "moderate risk" positions, significantly undercutting any lingering security fears. Finally, we note that NASA has taken years to implement NACI at JPL, a fact we construe as weakening any urgency in imposing the investigations before Appellants' claims are fully adjudicated on their merits.

III

Caltech separately argues that any injunctive relief should not encompass it because, as a private actor, it cannot be held liable for constitutional violations that arise from the government-imposed background investigations. Caltech is correct that there exists a "presumption that private conduct does not constitute government

action." *Sutton v. Providence St. Joseph Med. Ctr.,* 192 F.3d 826, 835 (9th Cir. 1999). This presumption is rebutted, however, when a sufficient nexus "make[s] it fair to attribute liability to the private entity as a governmental actor. Typically, the nexus consists of some *willful participation in a joint activity* by the private entity and the government." *Id.* at 843 (emphasis added).

Caltech notes that it initially opposed the new background investigations, which are conducted entirely by NASA and other government agencies; therefore, it claims that the investigations are not "joint activities" and Caltech is not a "willful participant." We have some sympathy for this argument, and if Caltech had done nothing more than abide by the contract terms unilaterally imposed by NASA, we might agree with its position. Here, however, the record is clear that Caltech did do more—it established, on its own initiative, a policy that JPL employees who failed to obtain federal identification badges would not simply be denied access to JPL, they would be terminated entirely from Caltech's employment. This decision does not necessarily render Caltech liable as a governmental actor, but it raises serious questions as to whether the university has in fact now become a willful and joint participant in NASA's investigation program, even though it was not so initially. Caltech's threat to terminate non-compliant employees is central to the harm Appellants face and creates the coercive environment in which they must choose between their jobs or their constitutional rights. Moreover, with the government enjoined, Caltech faces no independent harm to itself, so the balance of hardships tips overwhelmingly in Appellants' favor. Therefore, we hold that preliminary injunctive relief should apply both to Caltech and to Federal Appellees.

IV

Appellants have raised serious questions as to the merits of their informational privacy claim and the balance of hardships tips sharply in their favor. The district court's denial of the preliminary injunction was based on errors of law and hence was an abuse of discretion. Accordingly, we reverse and remand with instructions to fashion preliminary injunctive relief consistent with this opinion.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-56424

ROBERT M. NELSON; WILLIAM BRUCE BANERDT; JULIA BELL; JOSETTE BELLAN; DENNIS V. BYRNES; GEORGE CARLISLE; KENT ROBERT CROSSIN; LARRY R. D'ADDARIO; RILEY M. DUREN; PETER R. EISENHARDT; SUSAN D.J. FOSTER; MATTHEW P. GOLOMBEK; VAROUJAN GORJIAN; ZAREH GORJIAN; ROBERT J. HAW; JAMES KULLECK; SHARLON L. LAUBACH; CHRISTIAN A. LINDENSMITH; AMANDA MAINZER; SCOTT MAXWELL; TIMOTHY P. MCELRATH; SUSAN PARADISE; KONSTANTIN PENANEN; CELESTE M. SATTER; PETER M.B. SHAMES; AMY SNYDER HALE; WILLIAM JOHN WALKER; PAUL R. WEISSMAN, PLAINTIFFS-APPELLANTS

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, AN AGENCY OF THE UNITED STATES; MICHAEL GRIFFIN, DIRECTOR OF NASA, IN HIS OFFICIAL CAPACITY ONLY; UNITED STATES DEPARTMENT OF COMMERCE; CARLOS M. GUTIERREZ, SECRETARY OF COMMERCE, IN HIS OFFICIAL CAPACITY ONLY; CALIFORNIA INSTITUTE OF TECHNOLOGY, DEFENDANTS-APPELLEES

Argued and Submitted: Dec. 5, 2007
Filed: Jan. 11, 2008

Before: DAVID R. THOMPSON and KIM MCLANE WARDLAW, Circuit Judges, and EDWARD C. REED, JR.,* District Judge.

WARDLAW, Circuit Judge:

The named appellants in this action ("Appellants") are scientists, engineers, and administrative support personnel at the Jet Propulsion Laboratory ("JPL"), a research laboratory run jointly by the National Aeronautics and Space Administration ("NASA") and the California Institute of Technology ("Caltech"). Appellants sued NASA, Caltech, and the Department of Commerce (collectively "Appellees"), challenging NASA's recently adopted requirement that "low risk" contract employees like themselves submit to in-depth background investigations. The district court denied Appellants' request for a preliminary injunction, finding they were unlikely to succeed on the merits and unable to demonstrate irreparable harm. Because Appellants raise serious legal and constitutional questions and because the balance of hardships tips sharply in their favor, we reverse and remand.

I

JPL is located on federally owned land, but operated entirely by Caltech pursuant to a contract with NASA. Like all JPL personnel, Appellants are employed by

* The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

Caltech, not the government. Appellants are designated by the government as "low risk" contract employees. They do not work with classified material.

Appellants contest NASA's newly instated procedures requiring "low risk" JPL personnel to yield to broad background investigations as a condition of retaining access to JPL's facilities. NASA's new policy requires that every JPL employee undergo a National Agency Check with Inquiries (NACI), the same background investigation required of government civil service employees, before he or she can obtain an identification badge needed for access to JPL's facilities. The NACI investigation requires the applicant to complete and submit Standard Form 85 (SF 85), which asks for (1) background information, including residential, educational, employment, and military histories, (2) the names of three references that "know you well," and (3) disclosure of any illegal drug use within the past year, along with any treatment or counseling received for such use. This information is then checked against four government databases: (1) Security/Suitability Investigations Index; (2) the Defense Clearance and Investigation Index; (3) the FBI Name Check; and (4) the FBI National Criminal History Fingerprint Check. Finally, SF 85 requires the applicant to sign an "Authorization for Release of Information" that authorizes the government to collect "any information relating to [his or her] activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." The information sought "may include, but is not limited to, [the applicant's] academic, residential, achievement, performance, attendance, disciplinary, employment history,

and criminal history record information."[1] The record is vague as to the exact extent to and manner in which the government will seek this information, but it is undisputed that each of the applicants' references, employers, and landlords will be sent an "Investigative Request for Personal Information" (Form 42), which asks whether the recipient has "any reason to question [the applicant's] honesty or trustworthiness" or has "any adverse information about [the applicant's] employment, residence, or activities" concerning "violations of law," "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," or "other matters." The recipient is asked to explain any adverse information noted on the form. Once the information has been collected, NASA and the federal Office of Personnel Management determine whether the employee is "suitable" for continued access to NASA's facilities, though the exact mechanics of this suitability determination are in dispute.[2]

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[1] The form also notes that "for some information, a separate specific release will be needed," but does not explain what types of information will require a separate release.

[2] Appellants claim that the factors used in the suitability determination were set forth in a document, temporarily posted on JPL's internal website, labeled the "Issue Characterization Chart." The document identifies within categories designated "A" through "D" "[i]nfrequent, irregular, but deliberate delinquency in meeting financial obligations," "[p]attern of irresponsibility as reflected in . . . credit history," "carnal knowledge," "sodomy," "incest," "abusive language," "unlawful assembly," "attitude," "homosexuality . . . when indications are present of possible susceptibility to coercion or blackmail," "physical health issues," "mental, emotional, psychological, or psychiatric issues," "issues . . . that relate to an associate of the person under investigation," and "issues . . . that relate to a relative of the person under investigation." NASA neither concedes nor denies that these factors are

Since it was first created in 1958, NASA, like all other federal agencies, has conducted NACI investigations of its civil servant employees but not of its contract employees. Around the year 2000, however, NASA "determined that the incomplete screening of contractor employees posed a security vulnerability for the agency" and began to consider requiring NACI investigations for contract employees as well. In November 2005, revisions to NASA's Security Program Procedural Requirements imposed the same baseline NACI investigation for all employees, civil servant or contractor. These changes were not made applicable to JPL employees until January 29, 2007, when NASA modified its contract with Caltech to include the requirement. Caltech vigorously opposed the change, but NASA invoked its contractual right to unilaterally modify the contract and directed Caltech to comply immediately with the modifications. Caltech subsequently adopted a policy—not required by NASA—that all JPL employees who did not successfully complete the NACI process so as to receive a federal identification badge would be deemed to have voluntarily resigned their Caltech employment.

On August 30, 2007, Appellants filed suit alleging, both individually and on behalf of the class of JPL employees in non-sensitive or "low risk" positions, that NASA's newly imposed background investigations are unlawful. Appellants bring three primary claims: (1) NASA and the Department of Commerce (collectively "Federal Appellees") violated the Administrative Procedure Act ("APA") by acting without statutory authority

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considered as part of its suitability analysis; instead, it suggests that Appellants have not sufficiently proved that such factors will play a role in any individual case.

in imposing the investigations on contract employees; (2) the investigations violate their constitutional right to informational privacy; and (3) the investigations constitute unreasonable searches prohibited by the Fourth Amendment.

On September 24, 2007, Appellants moved for a preliminary injunction against the new policy on the basis that any JPL worker who failed to submit an SF 85 questionnaire by October 5, 2007 would be summarily terminated. The district court denied Appellants' request. It divided Appellants' claims into two categories—those challenging the SF 85 questionnaire itself and those challenging the grounds upon which an employee might be deemed unsuitable—and found that the challenges to the suitability determination were highly speculative and unripe for judicial review. The court rejected Appellants' APA claim, finding statutory support for the investigations in the National Aeronautics and Space Act of 1958 (the "Space Act"), which allows NASA to establish security requirements as deemed "necessary in the interest of the national security." 42 U.S.C. § 2455(a). Limiting its review to the SF 85 questionnaire, the court found the form implicated the constitutional right to informational privacy but was narrowly tailored to further the government's legitimate security interest. Finally, the court rejected Appellants' Fourth Amendment argument, holding that a background investigation was not a "search" within the meaning of the Fourth Amendment. After concluding that Appellants had little chance of success on the merits, the district court also found that they could not demonstrate irreparable injury, because any unlawful denial of access from JPL could be remedied post hoc through compensatory relief.

On appeal, a motions panel of our court granted a temporary injunction pending a merits determination of the denial of the preliminary injunction. *Nelson v. NASA,* 506 F.3d 713 (9th Cir. 2007). The panel concluded that the information sought by SF 85 and its waiver requirement raised serious privacy issues and questioned whether it was narrowly tailored to meet the government's legitimate interest in ascertaining the identity of its low-risk employees. *Id.* at 716. The panel further found that "[t]he balance of hardships tips sharply in favor of [A]ppellants," who risk losing their jobs pending appeal, whereas there was no exigent reason for performing the NACI investigations during the few months pending appeal given that "it has been more than three years since the Presidential Directive [upon which the government relies] was issued." *Id.* at 716.

II

To obtain preliminary injunctive relief, Appellants must demonstrate either "(1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor." *Walczak v. EPL Prolong, Inc.,* 198 F.3d 725, 731 (9th Cir. 1999). The two prongs are not separate tests but rather "extremes of a single continuum," so "the greater the relative hardship to [the party seeking the preliminary injunction], the less probability of success must be shown." *Id.* (internal quotation marks omitted).

Upon review of the merits of the district court's denial of preliminary injunctive relief, we find ourselves in agreement with the motions panel. Appellants have demonstrated serious questions as to certain of their

claims on which they are likely to succeed on the merits, and the balance of hardships tips sharply in their favor. We therefore conclude that the district court abused its discretion in denying Appellants' motion for a preliminary injunction, and we reverse and remand.

A. *Standing and Ripeness*

The district court found that the justiciability doctrines of ripeness and standing precluded consideration of Appellants' claims, except as they concerned the SF 85 questionnaire and associated waiver. We agree with the district court that Appellants' claims concerning the suitability determination are unripe and unfit for judicial review; however, the district court misconstrued Appellants' informational privacy claim, viewing it as limited to the SF 85 questionnaire alone.

To enforce Article III's limitation of federal jurisdiction to "cases and controversies," plaintiffs must demonstrate both standing and ripeness. To demonstrate standing, a plaintiff "must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal citations and quotation marks omitted). The ripeness doctrine similarly serves to "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies" and requires assessing "'both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Ass'n of Am. Med. Colls. v. United States,* 217 F.3d 770, 779-80 (9th Cir.

2000) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)).

In analyzing justiciability, the district court distilled Appellants' claims into two basic arguments: (1) "that SF 85 is overly broad and intrusive considering the 'low-risk' nature of [appellants'] jobs at JPL" and (2) "that JPL's internal policy, which lists various grounds upon which an employee can be determined unsuitable for employment, is unconstitutional." We agree that challenges to the suitability determination are unripe because the record does not sufficiently establish how the government intends to determine "suitability"—accordingly, any claims are "strictly speculative." We also agree that Appellants have standing to challenge the SF 85 questionnaire, and because "it is undisputed that if [Appellants] do not sign the SF 85 waiver by October 5, 2007," they will "be deemed to have voluntarily resigned," there exists a "concrete injury that is imminent and not hypothetical" and thus ripe for review.

However, the district court overlooked Appellants' challenges to the government *investigation* that will result from the SF 85 requirement that the applicant sign an "authorization for release of information." On its face, this waiver authorizes the government to collect "*any* information . . . from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information" "includ[ing], but . . . not limited to, . . . academic, residential, performance, attendance, disciplinary, employment history, and criminal history record information." It is uncontested that as a result of this authorization, the government Office of Personnel Management will send out "Investigative Request[s] for Per-

sonal Information," Form 42, to references, employers, and landlords. This form seeks highly personal information using an open-ended questioning technique, including asking for "any adverse information" at all or any "additional information which . . . may have a bearing on this person's suitability for government employment." Any harm that results from Form 42's dissemination and the information consequently provided to the government will be concrete and immediate.

Because Federal Appellees freely admit that Form 42 will be used in NASA's background investigations, Appellants have standing to challenge Form 42's distribution and solicitation of private information, and the issues raised in these challenges are ripe for review. The district court erred by excluding Form 42 claims from its analysis of Appellants' likelihood of success on the merits.

B. ***APA Claims***

Appellants argue that Federal Appellees violated the APA by imposing background investigations on contract employees without any basis in executive order or statute. In response, Federal Appellees find authorization for their program in three statutory and regulatory sources: The Homeland Security Presidential Directive 12 ("HSPD 12"), the Federal Information Security Management Act ("FISMA"), and the Space Act.

Both HSPD 12 and FISMA fail on their face to authorize the broad background investigations NASA has imposed on JPL personnel. HSPD 12 creates a Federal policy of "establishing a mandatory Government-wide standard for secure and reliable forms of identification issued by the Federal Government to its employees and

contractors (including contractor employees)." However, many of the questions in SF 85 and Form 42 seek much more information than that which would securely and reliably identify the employees. *Nelson,* 506 F.3d at 716. Similarly, FISMA gives the Secretary of Commerce authority to "prescribe standards and guidelines pertaining to Federal information systems," 40 U.S.C. § 11331(a)(1) (2002), but NASA's NACI requirement is hardly limited to protecting "Federal information systems." Indeed, the background investigations are required of all JPL personnel, whether or not they have access to information systems, and therefore cannot be entirely justified, if at all, by FISMA. That neither HSPD 12 nor FISMA authorize NASA's actions is reinforced by Federal Appellees' own declarations that "the decision to require at a minimum a NACI for NASA contractor employees dates back to the 2000 to 2001 timeframe," well before either FISMA was passed in 2002 or HSPD 12 was issued in 2004.

The Space Act, at first glance, appears more promising; however, it too fails to justify requiring these open-ended investigations of "low-risk" contract employees. The Space Act authorizes the NASA Administrator to "establish such security requirements, restrictions, and safeguards as he deems necessary in the interest of the national security." 42 U.S.C. § 2455(a) (1958). The district court found that this language "clearly gives NASA the authority to implement background investigations as part of the security screening of contractors;" however, it ignored the statute's limiting language that the security programs established be "deem[ed] necessary in the interest of the national security." This phrase must be read in light of *Cole v. Young,* 351 U.S. 536, 76 S. Ct. 861, 100 L. Ed. 1396 (1956), decided just two years be-

fore the Space Act was passed. In *Cole,* the Supreme Court considered a statute that gave certain government officials the power to summarily dismiss employees "when deemed necessary in the interest of the national security." *Id.* at 538, 76 S. Ct. 861 (internal quotation marks omitted). The Court noted:

> While that term is not defined in the Act, we think it clear from the statute as a whole that that term was intended to comprehend only those activities of the Government that are directly concerned with the protections of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare.

Id. at 544, 76 S. Ct. 861. The Court found it clear "that 'national security' was not used in the Act in an all-inclusive sense, but was intended to refer only to the protection of 'sensitive' activities. It follows that an employee can be dismissed 'in the interest of the national security' under the Act only if he occupies a 'sensitive' position. . . ." *Id.* at 551, 76 S. Ct. 861. We agree with Appellants that the use of identical limiting language in the Space Act so soon after *Cole* was decided strongly suggests that Congress expected the term "national security" to be similarly construed in this context. Therefore, the Space Act's authorization to establish "security requirements, restrictions, and safeguards" applies to "only those activities of the Government that are directly concerned with the protections of the Nation from internal subversion or foreign aggression," *id.* at 544, 76 S. Ct. 861, and background investigations can be deemed "in the interest of the national security" "only if [the target of the investigation] occu-

pies a 'sensitive' position," *id*. at 551, 76 S. Ct. 861. Here, it is undisputed that the Appellants do not occupy "sensitive" positions; they are low-risk employees. Because the district court's reading of the Space Act failed to account for the Supreme Court's holding in *Cole,* its conclusion as to Appellants' likelihood of success as to their APA claim was erroneous.

C. ***Informational Privacy Claims***

The district court similarly underestimated the likelihood that Appellants would succeed on their informational privacy claim. We have repeatedly acknowledged that the Constitution protects an "individual interest in avoiding disclosure of personal matters." *In re Crawford,* 194 F.3d 954, 958 (9th Cir. 1999). This interest covers a wide range of personal matters, including sexual activity, *Thorne v. City of El Segundo,* 726 F.2d 459 (9th Cir. 1983) (holding that questioning police applicant about her prior sexual activity violated her right to informational privacy), medical information, *Norman-Bloodsaw v. Lawrence Berkeley Lab.,* 135 F.3d 1260, 1269 (9th Cir. 1998) ("The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality"), and financial matters, *Crawford,* 194 F.3d at 958 (agreeing that public disclosure of social security numbers may implicate the right to informational privacy in "an era of rampant identity theft"). If the government's actions compel disclosure of private information, it "has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the

legitimate interest." *Crawford,* 194 F.3d at 959 (internal quotation marks omitted).

The district court correctly concluded that the requested information in this case is sufficiently private to implicate the right to informational privacy. SF 85 requires the applicant to disclose any illegal drug use within the past year, along with any treatment or counseling received. The Supreme Court has made clear, in the Fourth Amendment context, that individuals' reasonable expectations of privacy in their medical history includes information about drug use, *Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 617, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989), and, by analogy, drug treatment or counseling. Moreover, Form 42 inquiries distributed as part of the NACI—omitted from the district court's analysis as a result of its erroneous ripeness holding—are even more probing. Form 42 solicits "any adverse information" concerning "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," and "other matters." These open-ended questions are designed to elicit a wide range of adverse, private information that "is not generally disclosed by individuals to the public," *Crawford,* 194 F.3d at 958; accordingly, they must be deemed to implicate the right to informational privacy.

Considering the breadth of Form 42's questions, it is difficult to see how they could be narrowly tailored to meet any legitimate need, much less the specific interests that Federal Appellees have offered to justify the new requirement. Asking for "*any* adverse information about this person's employment, residence, or activities" may solicit some information relevant to "identity," "national security," or "protecting federal information sys-

tems," but there are absolutely no safeguards in place to limit the disclosures to information relevant to these interests. Instead, the form invites the recipient to reveal *any* negative information of which he or she is aware. There is nothing "narrowly tailored" about such a broad inquisition.

Finally, the context in which the written inquiries are posed further supports Appellants' claim. In *Thorne v. City of El Segundo,* 726 F.2d 459 (9th Cir. 1983), we focused not only on the private nature of questions asked, but also on the lack of standards governing the inquiry. We held that questioning a female police applicant about her past sexual relations with another officer in the department violated her constitutional right to informational privacy, *id.* at 468, finding that many of the questions posed went beyond any relevant lines of questioning, *id.* at 469-70. More importantly, we noted that the city had not set any *standards* for inquiring about the private information. *Id.* at 470. "When the state's questions directly intrude on the core of a person's constitutionally protected privacy and associational interests . . . , an unbounded, standardless inquiry, even if founded upon a legitimate state interest, cannot withstand the heightened scrutiny with which we must view the state's action." *Id.* In this case, the government's questions stem from SF 85's extremely broad authorization, allowing it "to obtain *any* information" from any source, subject to other releases being necessary only in some vague and unspecified contexts. Federal Appellees have steadfastly refused to provide any standards narrowly tailoring the investigations to the legitimate interests they offer. Given that Form 42's open-ended and highly private questions are authorized by this broad, standardless waiver and do not appear narrowly

tailored to any legitimate government interest, the district court erred in finding that Appellants were unlikely to succeed on their informational privacy claim.

D. *Fourth Amendment Claims*

We agree with the district court's conclusion that Appellants are unlikely to succeed on their Fourth Amendment claims. The government's actions are not likely to be deemed "searches" within the meaning of the Fourth Amendment. An action to uncover information is considered a "search" if the target of the search has a "reasonable expectation of privacy" in the information being sought, meaning a "subjective expectation of privacy . . . that society is prepared to recognize as reasonable." *United States v. Diaz-Castaneda,* 494 F.3d 1146, 1151 (9th Cir. 2007) (citing *Katz v. United States,* 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring)). Under our Fourth Amendment jurisprudence, one does not have a reasonable expectation of privacy in one's information merely because that information is of a "private" nature; instead, such an otherwise reasonable expectation can evaporate in any of several ways. *See, e.g., United States v. Miller,* 425 U.S. 435, 443, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) (holding that there is no reasonable expectation of privacy in bank records because the information was voluntarily disclosed to the bank).

The Form 42 questionnaire sent to third parties cannot be considered a "search," because "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities. . . ." *Miller,* 425 U.S. at 443, 96 S. Ct. 1619. This principle has its roots in *Hoffa v.*

United States, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966), and *United States v. White,* 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971), both of which dealt with the government's use of confidential informants and held that the Fourth Amendment "affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" *White,* 401 U.S. at 749, 91 S. Ct. 1122 (quoting *Hoffa,* 385 U.S. at 302, 87 S. Ct. 408). In *Miller,* the Supreme Court held that the Fourth Amendment did not protect subpoenaed bank records, seemingly extending the *Hoffa/White* principle to cover all information knowingly disclosed to the government by a third party. Under *Miller,* therefore, written inquiries sent to third parties, no matter how private the subject of their questioning, cannot be considered "searches."

Similarly, the questions posed directly to the applicant on the SF 85 questionnaire are also unlikely to be considered Fourth Amendment "searches," because that Amendment has not generally been applied to direct questioning. Instead, historically, when "the objective is to obtain testimonial rather than physical evidence, the relevant constitutional amendment is not the Fourth but the Fifth." *Greenawalt v. Ind. Dep't of Corr.,* 397 F.3d 587, 591 (7th Cir. 2005). As Judge Posner notes in *Greenawalt,* applying the Fourth Amendment to direct questioning would force the courts to analyze a wide range of novel contexts (e.g., courtroom testimony, police witness interviews, credit checks, and, as here, background checks) under a complex doctrine, with its cumbersome warrant and probable cause requirements and their myriad exceptions, that was designed with completely different circumstances in mind. *Id.* at 590-91. Moreover, declining to extend the Fourth Amendment

to direct questioning will by no means leave individuals unprotected, as such contexts will remained governed by traditional Fifth and Sixth Amendment interrogation rights and the right to informational privacy described above. *See id*. at 591-92.

E. ***Balance of Hardships***

The balance of hardships tips sharply toward Appellants, who face a stark choice—either violation of their constitutional rights or loss of their jobs. The district court erroneously concluded that Appellants will not suffer any irreparable harm because they could be retroactively compensated for any temporary denial of employment. It is true that "monetary injury is not normally considered irreparable," *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League,* 634 F.2d 1197, 1202 (9th Cir. 1980), and the JPL employees who choose to give up their jobs may later be made whole financially if the policy is struck down. However, in the meantime, there is a substantial risk that a number of employees will not be able to finance such a principled position and so will be coerced into submitting to the allegedly unconstitutional NACI investigation. Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm. *See Monterey Mech. Co. v. Wilson,* 125 F.3d 702, 715 (9th Cir. 1997). Moreover, the loss of one's job does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages.

On the other side of the balance, NASA has not demonstrated any specific harm that it will face if it is enjoined for the pendency of the adjudication from apply-

ing its broad investigatory scheme to "low risk" JPL contract employees, many of whom have worked at the laboratory for decades. As Caltech argues, JPL has successfully functioned without any background investigations since the first contract between NASA and JPL in 1958, so granting injunctive relief would make NASA no worse off than it has ever been. Moreover, an injunction in this case would not affect NASA's ability to investigate JPL personnel in "sensitive positions," significantly undercutting any lingering security fears. Finally, we note that NASA has taken years to implement NACI at JPL, a fact we construe as weakening any urgency in imposing the investigations before Appellants' claims are fully adjudicated on their merits.

III

Caltech separately argues that any injunctive relief should not encompass it because, as a private actor, it cannot be held liable for constitutional violations that arise from the government-imposed background investigations. Caltech is correct that there exists a "presumption that private conduct does not constitute government action." *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999). This presumption is rebutted, however, when a sufficient nexus "make[s] it fair to attribute liability to the private entity as a governmental actor. Typically, the nexus consists of some *willful participation in a joint activity* by the private entity and the government." *Id.* at 843 (emphasis added).

Caltech notes that it initially opposed the new background investigations, which are conducted entirely by NASA and other government agencies; therefore, it claims that the investigations are not "joint activities"

and Caltech is not a "willful participant." We have some sympathy for this argument, and if Caltech had done nothing more than abide by the contract terms unilaterally imposed by NASA, we might agree with its position. Here, however, the record is clear that Caltech did do more—it established, on its own initiative, a policy that JPL employees who failed to obtain federal identification badges would not simply be denied access to JPL, they would be terminated entirely from Caltech's employment. This decision does not necessarily render Caltech liable as a governmental actor, but it raises serious questions as to whether the university has in fact now become a willful and joint participant in NASA's investigation program, even though it was not so initially. Caltech's threat to terminate non-compliant employees is central to the harm Appellants face and creates the coercive environment in which they must choose between their jobs or their constitutional rights. Moreover, with the government enjoined, Caltech faces no independent harm to itself, so the balance of hardships tips overwhelmingly in Appellants' favor. Therefore, we hold that preliminary injunctive relief should apply both to Caltech and to Federal Appellees.

IV

Appellants have raised serious questions as to the merits of their informational privacy and APA claims, and the balance of hardships tips sharply in their favor. The district court's denial of the preliminary injunction was based on errors of law and hence was an abuse of discretion. Accordingly, we reverse and remand with instructions to fashion preliminary injunctive relief consistent with this opinion.

REVERSED and REMANDED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-56424

ROBERT M. NELSON; WILLIAM BRUCE BANERDT; JULIA BELL; JOSETTE BELLAN; DENNIS V. BYRNES; GEORGE CARLISLE; KENT ROBERT CROSSIN; LARRY R. D'ADDARIO; RILEY M. DUREN; PETER R. EISENHARDT; SUSAN D.J. FOSTER; MATTHEW P. GOLOMBEK; VAROUJAN GORJIAN; ZAREH GORJIAN; ROBERT J. HAW; JAMES KULLECK; SHARLON L. LAUBACH; CHRISTIAN A. LINDENSMITH; AMANDA MAINZER; SCOTT MAXWELL; TIMOTHY P. MCELRATH; SUSAN PARADISE; KONSTANTIN PENANEN; CELESTE M. SATTER; PETER M.B. SHAMES; AMY SNYDER HALE; WILLIAM JOHN WALKER; PAUL R. WEISSMAN, PLAINTIFFS-APPELLANTS

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, AN AGENCY OF THE UNITED STATES; MICHAEL GRIFFIN, DIRECTOR OF NASA, IN HIS OFFICIAL CAPACITY ONLY; UNITED STATES DEPARTMENT OF COMMERCE; CARLOS M. GUTIERREZ, SECRETARY OF COMMERCE, IN HIS OFFICIAL CAPACITY ONLY; CALIFORNIA INSTITUTE OF TECHNOLOGY, DEFENDANTS-APPELLEES

Oct. 11, 2007

ORDER

Before: B. FLETCHER, STEPHEN REINHARDT and MARSHA S. BERZON, Circuit Judges.

Appellants' motion for an injunction pending appeal is granted. Appellants raise serious legal and constitutional questions, and the balance of hardships tips sharply in their favor. *See Lopez v. Heckler,* 713 F.2d 1432, 1435 (9th Cir. 1983), *rev'd in part on other grounds,* 463 U.S. 1328, 104 S. Ct. 10, 77 L. Ed. 2d 1431 (1983), 464 U.S. 879, 104 S. Ct. 221, 78 L. Ed. 2d 217 (1983).

Appellants raise various legal and constitutional challenges to appellees' requirement that appellants each complete a questionnaire and execute a waiver for release of information. The questionnaire requires some information to which appellants do not object, such as appellant's name, date of birth, place of birth, and social security number. However, the questionnaire also includes inquiries to which appellants do object, including an inquiry about counseling they may have received. Appellants also object to the general waiver for release of information on the ground that it is overly broad and is not limited to information pertinent to their identity.

Appellees' questionnaire and waiver were adopted to implement Homeland Security Presidential Directive 12 (HSPD-12), which requires the promulgation of a federal standard for "secure and reliable forms of identification." Appellees' interest in obtaining the completed

forms for the purpose of investigating the identity of appellants is questionable, as the information that may be obtained goes far beyond that purpose. The waiver for release of information form authorizes appellees to perform a background investigation "to obtain any information relating to activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." Most appellants have worked for the Jet Propulsion Laboratory for over twenty years; none are required to have security clearances, as none have access to classified or secret material. All appellants have been designated "low risk" employees.

Because of the nature of the information subject to which the waiver applies, serious privacy concerns arise. This court has recognized the right to informational privacy. To justify actions infringing upon the right, the government must show that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet that interest. *See In re Crawford,* 194 F.3d 954, 958 (9th Cir. 1999); *see also Whalen v. Roe,* 429 U.S. 589, 598-99, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977).

The balance of hardships tips sharply in favor of appellants because if appellants do not complete the questionnaires for non-sensitive positions and the waivers for release of information, they are scheduled to lose their jobs before the appeal will be heard. On the other side of the scale, there is no emergency as to appellees' need for the answers to the questionnaires or for the execution of the waiver forms during the less than two months remaining before the case will be argued; it has been more than three years since the Presidential Directive

the government is relying upon was issued. Moreover, the need for the information to be collected is questionable in general, given the absence of any apparent relationship between its collection and the production of reliable identification cards for these employees. Accordingly, the injunction granted by this court on October 5, 2007 will continue in effect pending an expeditious appeal.

Appellants' motion for a stay of district court proceedings is denied.

The briefing schedule previously established remains in effect.

The Clerk shall calendar this appeal during the week of December 3-7, 2007, in San Francisco or Pasadena, California.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-5669 ODW (VBKx)

ROBERT M. NELSON, WILLIAM BRUCE BANERDT, JULIA BELL, JOSETTE BELLAN; DENNIS V. BYRNES, GEORGE CARLISLE, KENT ROBERT CROSSIN, LARRY R. D'ADDARIO, RILEY M. DUREN, PETER R. EISENHARDT, SUSAN D.J. FOSTER, MATTHEW P. GOLOMBEK, VAROUJAN GORJIAN, ZAREH GORJIAN, ROBERT J. HAW, JAMES KULLECK, SHARLON L. LAUBACH, CHRISTIAN A. LINDENSMITH, AMANDA MAINZER, SCOTT MAXWELL, TIMOTHY P. MCELRATH, SUSAN PARADISE, KONSTANTIN PENANEN, CELESTE M. SATTER, PETER M.B. SHAMES, AMY SNYDER HALE, WILLIAM JOHN WALKER AND PAUL R. WEISSMAN, PLAINTIFFS

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, AN AGENCY OF THE UNITED STATES; MICHAEL GRIFFIN, DIRECTOR OF NASA, IN HIS OFFICIAL CAPACITY ONLY; UNITED STATES DEPARTMENT OF COMMERCE; CARLOS M. GUTIERREZ, SECRETARY OF COMMERCE, IN HIS OFFICIAL CAPACITY ONLY; CALIFORNIA INSTITUTE OF TECHNOLOGY; AND
DOES 1-100, DEFENDANTS

[Filed: Oct. 3, 2007]

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

This is a privacy rights action brought by 28 plaintiffs who are scientists, engineers, and other personnel employed by California Technical Institute to work at NASA's Jet Propulsion Laboratory pursuant to a government contract. Plaintiffs object to Defendants' implementation of a new security background check.

Plaintiffs allege that the implementation of the new security measures violate: (1) their Fourth Amendment protection from unreasonable searches and seizures; (2) their Fourteenth Amendment right to privacy; (3) the Administrative Procedure Act; (4) the Privacy Act; and (5) the California Constitution. Plaintiffs seek injunctive and declaratory relief. This Court has jurisdiction to hear this action under 28 U.S.C. § 1331.

Currently before the Court is Plaintiffs' Motion for Preliminary Injunction, filed on August 30, 2007. Plaintiffs argue that, if a preliminary injunction is not granted, they will either have to comply with the new security measures or risk losing their jobs. After review of the parties' submissions, the *amicus curiae* briefs and the case file, as well as the arguments advanced by counsel at the hearing, the Court hereby DENIES Plaintiffs' Motion for Preliminary Injunction.

II. FACTUAL BACKGROUND

Defendant National Aeronautics and Space Administration ("NASA") was created by Congress in 1958. Defendant California Institute of Technology ("Caltech") is a non-profit educational institution located in Pasadena, California. The Jet Propulsion Laboratory ("JPL") is an operating division of Caltech, staffed entirely by Caltech employees. Since 1959, Caltech has operated JPL pursuant to a written contract as a NASA Federally Funded Research and Development Center. In short, Plaintiffs are contract employees for the federal government. JPL's actual physical facilities are also owned by NASA.

The 28 named Plaintiffs are scientists, engineers, and administrative support personnel employed by Caltech to work at the JPL facility on NASA programs. Plaintiffs allege that many of the named plaintiffs have worked at JPL for more than 20 years. None of the plaintiffs allegedly have had prior security clearances nor have they previously worked with classified material of any kind. Plaintiffs further contend that all research data that they generate is in the public domain and their findings are freely shared with the scientific community and the public.

On August 27, 2004, President Bush signed Homeland Security Presidential Directive 12 ("HSPD-12"), entitled "Policy for a Common Identification Standard for Federal Employees and Contractors," applicable to all Executive Branch departments and agencies. HSPD-12 directed the Secretary of Commerce to promulgate a Federal standard for "secure and reliable forms of identification" within six months. HSPD-12 defined "secure and reliable forms of identification" to mean identifica-

tion that is: (a) "issued based on sound criteria for verifying an individual employee's identity;" (b) "strongly resistant to identity fraud, tampering, counterfeiting and terrorist exploitation;" (c) "can be rapidly authenticated electronically;" and (d) "is issued only by providers whose reliability has been established by an official accreditation process."

In response to HSPD-12, in March 2006, the U.S. Department of Commerce ("DOC"), also named as a defendant in this action, promulgated a standard entitled "Personal Identification Verification (PIV) of Federal Employees and Contractors," codified at FIPS PUB 201-1. The sole authority for the PIV standard was based on HSPD-12 and imposed a background investigation requirement for all employees or contractors seeking to obtain the new form of identification. The PIV standard mandates that "only an individual with a background investigation on record is issued a credential." The PIV standard further specifies that the background investigation required for federal employment will be a "National Agency Check with Inquires," or its equivalent.

On May 24, 2007, NASA incorporated the above-mentioned requirements through a NASA Interim Directive, NPR 1600.1 ("NASA Directive"), that established a new "agency-wide policy for the creation and issuance of federal credentials at NASA." The NASA Directive states that it is being implemented in compliance with HSPD-12 and the PIV standard established by the DOC.

After the NASA Directive was established, JPL personnel were informed that they would have to submit to a background investigation, the extent of which would be determined by their position's risk level. The back-

ground investigation is a prerequisite to receiving the required PIV badge.

For "low risk" employees, such as all plaintiffs in this case, the investigation begins with completion of Standard Form 85 ("SF-85"), a questionnaire for non-sensitive positions. SF-85 requires various types of background information to which Plaintiffs do not object, such as name, date of birth, place of birth, social security number, etc. The form also requires information about employment and residential history for the past five years, educational history starting with high school, the names of three individuals who know the applicant well, and a statement as to whether the applicant has used illegal drugs in the past year.

Applicants are also required to sign, as part of SF-85, an "Authorization for Release of Information," which authorizes the agency to collect "any information relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." *See* SF-85 at p.6. Plaintiffs argue that the language in the waiver is overly broad considering the "low risk" nature of their jobs.

After the waiver is signed, written inquires are then made to educational institutions, former employers, landlords, and references. These inquires are used to verify the applicant's historical information. Plaintiffs allege that the landlords, past employers, etc. are also asked to report any adverse information they have on the plaintiff with respect to "abuse of alcohol or drugs," "financial integrity," "mental or emotional stability," "general behavior or conduct," and "other matters."

The NASA Directive states that if the investigation process yields any "derogatory or unfavorable information," it will be forwarded to the Human Resources Officer for JPL, who will determine "employment suitability." JPL has allegedly posted on an internal website the various grounds upon which "employment suitability" will be determined. The grounds allegedly include "infrequent, irregular but deliberate delinquency in meeting financial obligations," "pattern of irresponsibility as reflected in . . . credit history," "sexual misconduct with impact on job," "sodomy," "attitude," "personality conflict," "absenteeism or attendance problems," "homosexuality," "judgment, reliability and dependability issues," "physical health issues," "mental, emotional, psychological or psychiatric issues," "issues . . . that relate to an associate of the person under investigation," and "issues . . . that relate to a relative of the person under investigation."[1]

Plaintiffs allege that they have been informed at public meetings and by JPL senior administrators that if they do not have their PIV badge by October 27, 2007, they will be barred from the JPL premises and will be deemed to have terminated their employment with JPL. Plaintiffs have until October 5, 2007 to fill out SF-85 and other required documents in order to be eligible to re-

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[1] While Plaintiffs allege that JPL's internal policy specifically mentions "homosexuality," "judgment, reliability and dependability issues," "physical health issues," "mental, emotional, psychological or psychiatric issues," "issues . . . that relate to an associate of the person under investigation," and "issues . . . that relate to a relative of the person under investigation" as grounds upon which a person can be determined unsuitable for employment, the exhibit Plaintiffs use to support this allegation is devoid of any mention of these particular "grounds." *See* Exhibit R attached to the Penanen Declaration.

ceive their PIV badge by October 27, 2007. Because of this, Plaintiffs allege that they will suffer irreparable harm. Accordingly, Plaintiffs have filed the instant motion for preliminary injunction.

III. DISCUSSION

A. Legal Standard—Preliminary Injunction

In deciding whether to issue a preliminary injunction, a court must balance the plaintiffs' likelihood of success against the relative hardship to the parties. *Walczak v. EPL Prolong, Inc.,* 198 F.3d 725, 731 (9th Cir. 1999). A court may appropriately issue a preliminary injunction where the "plaintiffs demonstrate either: (l) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [their] favor." *S.W. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc) (internal quotation marks omitted). "These two alternatives represent 'extremes of a single continuum,' rather than two separate tests." *Clear Channel Outdoor Inc. v. City of L.A.*, 340 F.3d 810, 813 (9th Cir. 2003) (quoting *Walczak,* 198 F.3d at 731). "Thus, the greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be established by the party." *Beardslee v. Woodford,* 395 F.3d 1064, 1067 (9th Cir. 2005).

The district court must also consider whether the public interest favors issuance of the injunction. *Id*. "This alternative test for injunctive relief has been formulated as follows: a plaintiff is required to establish '(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if prelimi-

nary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).'" *Shelley,* 344 F.3d at 917-18 (quoting *Johnson v. Bd. of Accountancy,* 72 F.3d 1427, 1430 (9th Cir. 1995)).

B. Analysis

1. Standing and Ripeness

"Article III of the [U.S.] Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright,* 468 U.S. 737, 750 (1984). "In order to ensure that a federal court's Article III power has been properly invoked, the courts have developed several doctrines, including standing, mootness, and ripeness, each of which imposes a different requirement on the substance of a plaintiffs claim." *Lee v. State of Or.*, 107 F.3d 1382, 1387 (9th Cir. 1997) (citing *Allen,* 468 U.S. at 750). These doctrines present threshold questions pertaining to federal court jurisdiction. Thus, "[b]efore the judicial process may be invoked, a plaintiff must show that the facts alleged present the court with a case or controversy in the constitutional sense and that [they are] proper plaintiff[s] to raise the issues sought to be litigated." *Olagues v. Russoniello,* 770 F.2d 791,796 (9th Cir. 1985) (citations omitted). We are particularly concerned in this case with standing and ripeness.

To establish standing, a plaintiff must demonstrate that he has suffered an "injury in fact"—"an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). "Whether a dispute is ripe depends

on 'the fitness of the issues for judicial decision' and 'the hardship to the parties' of withholding review." *Hotel Employees and Rest. Employees Int'l Union v. Nev. Gaming Comm'n,* 984 F.2d 1507, 1512-13 (9th Cir. 1993) (quoting *Abbott Lab. v. Gardner,* 387 U.S. 136, 149 (1967) (*abrogated on other grounds*)). Plaintiffs bear the burden of alleging the facts necessary to establish standing and ripeness. *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990).

Here, it is first necessary to determine the alleged cause of Plaintiffs' injury or potential injury. It is the "cause" of potential injury or injuries that initially appears intertwined and confusing. However, for the sake of clarity, the Court separates Plaintiffs' grievance into two parts. First, Plaintiffs argue that SF-85 is overly broad and intrusive considering the "low-risk" nature of their jobs at JPL. Second, Plaintiffs argue that JPL's internal policy, which lists various grounds upon which an employee can be determined unsuitable for employment, is unconstitutional. The Court feels that by separating Plaintiffs' allegations into these two distinct issues, the standing and ripeness issues can be better analyzed.

First, dealing with the SF-85 argument alone, it appears that Plaintiffs have standing and their allegations regarding SF-85 are ripe for review. "Where only injunctive or declaratory relief is sought, a plaintiff must show 'a very significant possibility' of future harm in order to have standing to bring suit." *Coral Const. Co. v. King County,* 941 F.2d 910, 929 (9th Cir. 1991) (quoting *Nelsen v. King County,* 895 F.2d 1248, 1250 (9th Cir. 1990). "The complainant must allege an injury to himself that is distinct and palpable, as opposed to merely

abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical." *Whitmore* v. *Ark.*, 495 U.S. 149, 155 (1990) (citations omitted). Here, it is undisputed that if Plaintiffs do not sign the SF-85 waiver by October 5, 2007 they will not receive their identification badges. Without their badges they will not have access to the JPL premises and will thus be deemed to have voluntarily resigned. It appears that this is a concrete injury that is imminent and not hypothetical.

Second, the Court looks to Plaintiffs' attack on JPL's internal policy that explains when someone is "unsuitable" for employment. It is clear that this "policy" has not caused an "injury in fact." There is also not an imminent injury. It is strictly speculative to allege that JPL's "policy" will ever come into play. In addition, there have been no facts to show that the "policy" is truly a JPL policy or just a list found on JPL's internal website. Accordingly, the Court finds that Plaintiffs do not have standing to attack this alleged policy. And the policy itself is also not ripe for review. Therefore, to streamline this case, the Court will only focus on SF-85 and whether the government is justified in requiring Plaintiffs to sign the form.

2. Likelihood of Success on the Merits

a. Plaintiffs' Fourth Amendment Claim

Plaintiffs' contention is that the SF-85 form and waiver required by NASA are unreasonable searches in violation of the Fourth Amendment. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ."

The Court agrees with Defendants' argument that the Fourth Amendment has never applied to background checks. And, if the Fourth Amendment does apply to this case, Plaintiffs have not shown how. Plaintiffs rely on cases addressing whether the search of an employee's body and seizure of bodily fluids through a drug testing constitutes an unreasonable search and seizure. Plaintiffs make no argument that a questionnaire, background check, or authorization to release records constitutes a "search." Plaintiffs bear the burden to demonstrate that a search or seizure has occurred, that they have a "reasonable expectation of privacy" in the information being sought, and that the expectation of privacy is "protectable" in this specific instance. In short, Plaintiffs have not shown the Court how the Fourth Amendment applies.

In addition, even if Plaintiffs were able to show that a background check invokes the Fourth Amendment, the Supreme Court has noted that "we have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment." *U.S. v. Karo,* 468 U.S. 705, 712 (1984). Here, there has not been an actual invasion of privacy, but only a potential invasion since the government has not yet checked any of the Plaintiffs' backgrounds. Therefore, there is not a likelihood that Plaintiffs' Fourth Amendment claim will succeed on the merits.

b. Plaintiffs' Fourteenth Amendment Claim

Plaintiffs' second claim alleges a "[v]iolation of U.S. Constitution, Fourteenth Amendment." *See* Compl, ¶ 19. However, the Fourteenth Amendment applies only to the states, not the federal government. *See* U.S.

Const. amend. XIV, § 1 (". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."); *see also Bolling v. Sharpe,* 347 U.S. 497, 499 (1954) ("[the] Fourteenth Amendment . . . applies only to the states."). Here, Plaintiffs allege no conduct by any state or state agency, and they present no argument that the Fourteenth Amendment should apply to the federal government, a federal agency, or a private entity acting pursuant to a federal directive. Plaintiffs concede in their Joint Reply that the Fourteenth Amendment does not apply to the federal government. *See* Joint Reply at p.7. Accordingly, Plaintiffs are unlikely to succeed on the merits of their Fourteenth Amendment claim.

c. Plaintiffs' Claim that Defendants' Privacy Waiver and Background Investigation Policies Violate the Administrative Procedure Act

The Administrative Procedure Act ("APA") requires courts to "hold unlawful and set aside agency action found to be . . . not in accordance with law." 5 U.S.C. § 706(2)(c). In this case, Plaintiffs argue that the DOC and NASA acted as lawmakers by creating a mandate that federal contractors must submit to an extensive background check in order to gain access to federal facilities. Specifically, Plaintiffs argue that HSPD-12 itself contains no directive or policy regarding a background investigation, but is concerned only with the establishment of a "Federal standard for secure and reliable forms of identification." HSPD-12(2).

Defendants argue that the central purpose of HSPD-12 is to "enhance security" and, in so doing, HSPD-12 granted DOC the discretion to determine the "sound

criteria" agencies must use to verify employee and contractor identity. Accordingly, Defendants argue HSPD-12 necessarily authorizes some level of investigation and evaluation of the individual's background.

In addition, Defendants argue that Plaintiffs ignore the fact that NASA has the power to require background investigations via the National Aeronautics and Space Act of 1958 ("Space Act"). The Space Act states:

> The Administrator shall establish such security requirements, restrictions, and safeguards as he deems necessary in the interest of the national security. The Administrator may arrange with the Director of the Office of Personnel Management for the conduct of such security or other personnel investigations of the Administration's officers, employees, and consultants, and its contractors and subcontractors and their officers and employees, actual or prospective, as he deems appropriate; and if any such investigation develops any data reflecting that the individual who is the subject thereof is of questionable loyalty the matter shall be referred to the Federal Bureau of Investigation for the conduct of a full field investigation, the results of which shall be furnished to the Administrator.

42 U.S.C. § 2455(a). The language of the Space Act clearly gives NASA the authority to implement background investigations as part of the security screening of contractors. Therefore, it appears that Plaintiffs are unlikely to succeed on the merits of their APA claim.

d. Claim that Defendants' Policies Violate the Privacy Act

Plaintiffs claim that Defendants' policy directly violates several sections of the Privacy Act of 1974, codified at 5 U.S.C. § 552a(a)-(q). The Privacy Act requires that a federal agency "maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency." 5 U.S.C. § 552a(e)(l). In addition to "maintaining" information, the Act's "legislative history also reveals a concern for unwarranted collection of information as a distinct harm in and of itself." *Albright v. U.S.,* 631 F.2d 915, 919 (D.C. Cir. 1980). Here, however, SF-85 specifically states that it complies with the Privacy Act. *See* SF-85 at p.2. Thus, until such time Plaintiffs can show that information collected via SF-85 was not properly maintained or gathered, the Court will give deference to an Executive Branch agency's assurance that its SF-85 complies with the Privacy Act.

Further, even if Plaintiffs might have a meritorious claim under the Privacy Act *after* the information is collected, the Ninth Circuit has noted that Congress did not intend to authorize the issuance of injunctions when dealing with certain sections of the Privacy Act. *Cell Assocs., Inc. v. Nat'l Insts. of Health, Dept. of Health, Ed. and Welfare,* 579 F.2d 1155, 1059 (9th Cir. 1978). Here, it appears that Plaintiffs are seeking a civil remedy under 5 U.S.C. §§ 552a(g)(1)(C) and/or 552a(g)(l)(D), which, as the Ninth Circuit has noted, do not provide for injunctive relief. *Id.* Therefore, while Plaintiffs' Privacy Act claim might have merit at a later time, it is not ripe for purposes of a preliminary injunction.

e. Informational Privacy

It appears that Plaintiffs' best claim is one for "informational privacy." While Plaintiffs have not specifically alleged "informational privacy" in their Complaint, they have given the allegation great weight in their papers that support their instant motion. Plaintiffs cite to Fed. Rule Civ. Pro. 8(f), which provides that "all pleadings shall be so construed as to do substantial justice." Thus, even though it is not clearly pled, the Court will entertain Plaintiffs' "informational privacy" claim here.

"While the Supreme Court has expressed uncertainty regarding the precise bounds of the constitutional 'zone of privacy,' its existence is firmly established." *In re Crawford,* 194 F.3d 954, 958 (9th Cir. 1999) (citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) and *Griswold v. Conn.,* 381 U.S. 479, 483 (1965)). The Ninth Circuit has "observed that the relevant Supreme Court precedents delineate at least two distinct kinds of constitutionally-protected privacy interests: 'One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.'" *Id*. (quoting *Doe v. Attorney Gen.,* 941 F.2d 780, 795 (9th Cir. 1991)).

It is clear that Ninth Circuit precedent supports Plaintiffs' claim for informational privacy, thus, the question before the Court is whether Plaintiffs are likely to succeed with this claim on the merits. "The right to informational privacy, however, 'is not absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest.'" *Id*. at 959 (quoting *Doe v. Attorney Gen.,* 941 F.2d at 796). "Our precedents demand that we 'engage in the delicate task

of weighing competing interests' to determine whether the government may properly disclose private information." *Id.* (quoting *Doe v. Attorney Gen.,* 941 F.2d at 796). Relevant factors to be considered include:

> . . . the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Id. (citing *Doe v. Attorney Gen.,* 941 F.2d at 796). "This list is not exhaustive, and the relevant considerations will necessarily vary from case to case." *Id.* "In each case, however, the government has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Id.* (citing *Doe v. Attorney Gen.,* 941 F.2d at 796). "In most cases, it will be the overall context, rather than the particular item of information, that will dictate the tipping of the scales." *Id.*

Here, the information requested is set forth in SF-85. SF-85 requires various background information to which Plaintiffs do not object, such as name, date of birth, place of birth, social security number, etc. The form also requires information about employment and residential history for the past five years, educational history starting with high school, the names of three individuals who know the applicant well, and a statement

as to whether the applicant has used illegal drugs in the past year.

A specific portion of SF-85 that the Court was initially troubled by was the illegal drug use question. However, the government has safeguarded Plaintiffs' Fifth Amendment rights by noting that an applicant's response to the drug use question will not be used against the applicant in any subsequent criminal proceeding. *See* SF-85 question 14. The government's instructions to SF-85 also state that "[g]iving us the information we ask for is voluntary." *See* SF-85 at p. 1. Therefore, the Court's analysis as to the first part of SF-85 tips in favor of the government, because the questionnaire itself is relatively non-intrusive. And, there are adequate safeguards in place when dealing with sensitive questions.

The second part of Plaintiffs' argument pertains to page six of SF-85, which contains the "Authorization for Release of Information." Plaintiffs argue that the language contained in the release is overly broad. Plaintiffs specifically object to the following language that the Court has italicized:

> I [a]uthorize *any* investigator, special agent, or other duly accredited representative of the authorized Federal agency conducting my background investigation, to obtain *any* information relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, *or other sources of information.* This information may include, *but is not limited to,* my academic, residential, achievement, performance, attendance, disciplinary, employment history, and criminal history record information.

When analyzing the language of the release, it is necessary to apply the test from *Crawford*, which states that "the government has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Crawford*, 194 F.3d at 958. Here, the government has shown that it has an interest in "enhancing security" at federal facilities. The Court concludes that this is a legitimate governmental interest. Further, Defendants have declared that a "procedure whereby the government attempts to verify the correctness of the information entered onto the form substantially improves the probability of detecting individuals claiming a false identity." Federal Defendants' Opp'n at 6. Verifying the identity of federal contractors is also a legitimate interest.

The Court must now determine whether the government's actions are narrowly tailored to meet the legitimate interest. The Court is persuaded by the government's position that "[k]nowing the name of an individual does nothing to enhance security unless the agency also verifies that the individual is not connected to activity that poses a security threat." Federal Defendants' Opp'n at 12. Thus, the language in the release referring to "other sources of information" is justified because it allows the government some leeway in conducting its investigation. Indeed, the government notes that the release "must allow the investigators some flexibility to follow up on relevant needs." The Court agrees.

There are also safeguards in place on the face of the release that support the notion that the release is narrowly tailored. The release states: "for some sources of information, a separate release will be needed." This

language shows that the release does not cover all sources of information. The Court also reiterates that any potential information that *might* be uncovered as a result of the release is not relevant to the Court's analysis, because hypothetical harms are not ripe for review. Therefore, the Court finds, for purposes of this Order only, that the government's actions are narrowly tailored to meet its legitimate interest.

Plaintiffs also emphasize that the authorization form is overly broad *as applied* to each of the plaintiffs, because they are "low risk" contractors. However, the Court disagrees with this contention. The release itself is a standard SF-85. It does not seek extensive or overly-sensitive information. The Court also notes that NASA and its facilities require a relatively secure environment. And, while the Court concedes that JPL is not the Central Intelligence Agency, there are still very high-tech and sensitive devices at JPL, such as satellite monitoring equipment, that warrant strict security measures. Plaintiffs' argument that JPL's security has been lax up until now is unpersuasive. Accordingly, the evidence presented by Plaintiffs does not show a likelihood of success on the merits with regard to their informational privacy claim.

3. Possibility of Irreparable Injury to Plaintiffs

Plaintiffs argue that if a preliminary injunction is not granted, they will either have to comply with the new security measures or risk losing their jobs. Of course losing one's job and livelihood is a great harm. However, "[t]he key word in this consideration is *irreparable*. . . . The possibility that adequate compensatory or other corrective relief will be available at a later date, in

the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980) (emphasis added). As Defendants point out, any temporary denial of access to JPL does not amount to irreparable harm. Notably, there is an appeals process incorporated into the new security check process where applicants who are denied badges can seek redress from a three-person appeals panel. *See* Exhibit P in support of Plaintiffs' Motion at p. 19. If Plaintiffs were to succeed by way of the appeals panel, their access could then be restored, and Plaintiffs could resume working at the facility. Thus, this Court does not provide the only remedy available to Plaintiffs.

The other possible injury that Plaintiffs allege pertains to having to give out their private information. However, unlike other cases in the area of informational privacy, Plaintiffs here are not literally disclosing private information, aside from the illegal drug question discussed above. By filling out SF-85, Plaintiffs are simply giving authorization for the government to perform a background investigation. And at this point the Court is only looking at a facial challenge to SF-85. Anything that *might* arise after an employee signs the authorization form is purely speculative and not ripe for review. Therefore, the argument that Plaintiffs will suffer irreparable harm by signing an authorization form is without merit.

IV. CONCLUSION

For the forgoing reasons, the Court finds that Plaintiffs have not shown either a likelihood of success on the

merits or irreparable injury. Therefore, Plaintiffs' Motion for Preliminary Injunction is DENIED.

DATED: Oct. 3, 2007

/s/ OTIS D. WRIGHT
HON. OTIS D. WRIGHT II
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-56424

ROBERT M. NELSON; ET AL., PLAINTIFFS-APPELLANTS

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, AN AGENCY OF THE UNITED STATES, ET AL., DEFENDANTS-APPELLEES

June 4, 2009

ORDER

Before: DAVID R. THOMPSON and KIM MCLANE WARDLAW, Circuit Judges, and EDWARD C. REED, JR.,[*] District Judge.

Order; Concurrence by Judge WARDLAW; Dissent by Judge CALLAHAN; Dissent by Judge KLEINFELD; Dissent by Chief Judge KOZINSKI.

Judges Thompson, Wardlaw, and Reed voted to deny Appellees' petition for panel rehearing. Judge Wardlaw voted to deny Appellees' petition for rehearing en banc, and Judges Thompson and Reed so recommended.

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[*] The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R. App. P. 35. Judges O'Scannlain and Ikuta were recused.

The petition for rehearing en banc is denied.

IT IS SO ORDERED.

WARDLAW, Circuit Judge, concurring in the denial of rehearing en banc, joined by PREGERSON, REINHARDT, W. FLETCHER, FISHER, PAEZ, and BERZON Circuit Judges:

Because the preliminary posture and the lack of an evidentiary record prevent us from fully reviewing the merits of this appeal, because the panel opinion creates no intra- or inter-circuit split, and because the narrow holding does not present an issue of exceptional importance, the active judges of our court, in a vote that was not close,[1] denied rehearing of this case en banc. I concur.

This is an interlocutory appeal from the denial of a preliminary injunction sought by a class[2] of long-term

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[1] *Compare Cooper v. Brown*, 565 F.3d 581, 636 (9th Cir. 2009) (Reinhardt, J., dissenting from denial of rehearing en banc).

[2] The putative class consists of up to 9,000 employees-not merely the 28 class representatives referenced in Judge Callahan's dissent. Class representatives include preeminent research scientists who have coordinated the Mars Exploration Rover Mission, served on the Jet Propulsion Laboratory ("JPL") Senior Research Counsel, and led NASA's New Millennium Program and the Mars Pathfinder Mission. Class representatives also include leading engineers who have been at the forefront of many recent space missions, including the Mars Exploration Rovers Project, and the Galileo, Messenger (Mercury), and Magellan

California Institute of Technology ("Caltech") employees, including scientists, engineers, and administrative support personnel—all classified by the National Aeronautics and Space Administration ("NASA") as low risk employees.[3] They oppose implementation of a new, wide-ranging, and highly intrusive background check imposed as a condition of their continued employment at Jet Propulsion Laboratory ("JPL"). Caltech itself objected to the new requirement as "inappropriate." Reversing the district court's denial of the preliminary injunction, we concluded that, as to the constitutional right of privacy claim,[4] "serious questions going to the merits were raised and the balance of harms tips sharply in [the plaintiff-class's] favor," *Walczak v. EPL Pro-*

(Venus) missions, as well as JPL's chief engineer for flight dynamics, the project system engineer for the Kepler Space Observatory, and a lead principal engineer on the Constellation Program. Their research and findings have been published widely in scientific, peer-reviewed journals, and they have received hundreds of prestigious awards from NASA and the research community. The success of their scientific mission, which has been operating since 1958 without the new background checks, is renowned.

[3] Low risk employment positions do not involve policymaking, major program responsibility, public safety, duties demanding a significant degree of public trust, or access to financial records with significant risk of causing damage or realizing personal gain. *See* 5 C.F.R. § 731.106(b) (defining the characteristics of positions at the high or moderate risk levels). NASA itself designated members of the plaintiff class as low risk; low risk employees comprise ninety-seven percent of JPL employees. NASA's designation of every position subject to a suitability determination "as a high, moderate, or low risk level as determined by the position's potential for adverse impact to the efficiency or integrity of the service" is authorized by the U.S. Office of Personnel Management. *See* 5 C.F.R. § 731.106(a).

[4] We affirmed the district court's rejection of the class's Administrative Procedure Act and Fourth Amendment claims.

long, Inc., 198 F.3d 725, 731 (9th Cir. 1999),[5] where the class faced the Hobson's choice of losing their jobs or submitting to an unprecedented intrusion into their private lives for which the government failed to advance a legitimate state interest. *Nelson v. NASA* (*Nelson II*), 530 F.3d 865, 883 (9th Cir. 2008). "[S]ubsumed in our analysis of the balance of hardship to the parties," *Golden Gate Rest. Ass'n v. City & County of S.F.,* 512 F.3d 1112, 1126 (9th Cir. 2008), was our determination that this "injunction is in the public interest," *Winter v. Natural Res. Def. Council, Inc.,* — U.S. —, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008), since it is indisputable that entry of the injunction "further[s] the public's interest in aiding the struggling local economy and preventing job loss," *The Lands Council v. McNair,* 537 F.3d 981, 1005 (9th Cir. 2008) (en banc).[6] *See Nelson II,* 530

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[5] Because our decision issued in December 2007, we did not have the benefit of the Supreme Court's most recent formulation of the preliminary injunction standard in *Winter v. Natural Resources Defense Council, Inc.,* —U.S.—, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008) (holding that a party requesting preliminary injunctive relief must demonstrate "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest"). Our result would be no different under *Winter,* however, because we did not apply the "possibility of irreparable injury" standard that the *Winter* Court found "too lenient." *Id.* at 375. Instead, we concluded that the employees "face[d] a stark choice—either violation of their constitutional rights or loss of their jobs." *Nelson II,* 530 F.3d at 881. "[C]onstitutional violations . . . generally constitute irreparable harm" and "the loss of one's job . . . carries emotional damages and stress, which cannot be compensated by mere back payment of wages." *Id.* at 882. Irreparable harm, therefore, was not only likely, but certain.

[6] Thus, the public interest requires consideration of the fact that the California unemployment rate reached 10.1 percent in January 2009

F.3d at 881-82. A prior three-judge panel of our court had ruled identically in issuing an injunction pending the merits hearing of this appeal. *Nelson v. NASA* (*Nelson I*), 506 F.3d 713, 715 (9th Cir. 2007).

Judge Callahan writes that, "[u]ntil now, no court has held that applicants have a constitutionally protected right to privacy in information disclosed by employment references." This is a misstatement of our panel's holding. No "applicants" are members of the putative class, only existing long-term employees. Each class member, when hired, underwent extensive background checks, including employment references. The employees challenge now a newly proposed, free-floating, wide-ranging inquiry with no standards, limits, or guarantee of nondisclosure to third parties, for which the government intends to coerce a "release" by threatening the loss of their jobs. Contrary to Judge Callahan's representation, the newly proposed investigation is not limited to information "voluntarily turn[ed] over to third parties."[7]

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due to the loss of 79,300 jobs, the largest unemployment increase in any state for the month, *see Regional and State Employment and Unemployment Summary,* U.S. Bureau of Labor Statistics 1, 3 (Mar. 11, 2009). Clearly, the public interest in minimizing job loss in this difficult economic climate, *The Lands Council*, 537 F.3d at 1005, weighs in favor of the injunction pending a merits determination. The loss of up to 9,000 jobs from one of Pasadena's largest employers would be particularly devastating in this community, which has an estimated labor force of 77,200 people. *See Monthly Labor Force Data for Cities and Census Designated Places February 2009,* State of California Employment Development Department (Mar. 20, 2009).

[7] Even if it was, Judge Callahan's contention misses the crucial point that the right to informational privacy and Fourth Amendment rights are not fully coextensive. *See Nelson II,* 530 F.3d at 880 n.5. In our opinion, we noted that although in the Fourth Amendment context there is a general principle "'that a person has no legitimate expecta-

Some of the information sought from neighbors, landlords, employment supervisors, and the like includes private sexual practices, sexual orientation, and physical and psychological health issues, and the government does not ask sources to limit their answers only to information voluntarily shared by the subject person. Judge Callahan also suggests that our opinion protects information about drug treatment "in the face of a legitimate need by the employer to protect the safety and security of a facility." The opinion does no such thing—rather, we specifically noted that *in this context,* open-ended inquiries and questions regarding drug treatment are not *narrowly tailored* to a legitimate need to protect the facility. *Nelson II,* 530 F.3d at 880-81.

Our opinion is actually much narrower than Judge Callahan would have her audience believe. Adhering to our precedent in *In re Crawford,* 194 F.3d 954 (9th Cir. 1999) (holding that public disclosure of Social Security numbers implicates the right to informational privacy), *Norman-Bloodsaw v. Lawrence Berkeley Laboratory,* 135 F.3d 1260 (9th Cir. 1998) (holding that unauthorized employer testing for sensitive medical information violates employees' right to informational privacy), *Doe v. Attorney General,* 941 F.2d 780 (9th Cir. 1991) (holding that an individual's HIV-status is afforded informational privacy protection and that the government may seek

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tion of privacy in information he voluntarily turns over to third parties,'" *id*. (quoting *Smith v. Maryland,* 442 U.S. 735, 743-44, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979), and citing *United States v. Miller,* 425 U.S. 435, 443, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976)), "the 'legitimate expectation of privacy' described in this context is a term of art used only to define a 'search' under the Fourth Amendment, and *Miller* and *Smith* do not preclude an *informational privacy* challenge to government questioning of third parties about highly personal matters," *id*.

and use such information only if its actions are narrowly tailored to meet legitimate interests), and *Thorne v. City of El Segundo,* 726 F.2d 459 (9th Cir. 1983) (holding that a potential employee of the state may not be required to disclose personal sexual matters to gain the benefits of state employment), we concluded that only two aspects[8] of the government inquiries in the challenged Standard Form 85 ("SF 85") questionnaire and Investigative Request for Personal Information ("Form 42") raised serious informational privacy concerns. *Nelson II,* 530 F.3d at 879-81. After engaging in the requisite delicate balancing, we reasoned that although the government asserted several legitimate interests in investigating its contract employees, it had failed to demonstrate that its inquiry was narrowly tailored to meet those interests; further, the government asserted no legitimate interest to justify inquiries regarding drug treatment, as opposed to drug use. *Id.* We reversed the district court *only* to the extent that the government sought disclosure of "any treatment or counseling received" at *any* time for drug problems, *id.* at 879, and planned to engage in a free-ranging investigation of the most private aspects of class members' lives, *id.* at 880-81.

I.

The class challenges the limitless nature of the private information the government now seeks and the potential uses for this information. The newly instated

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[8] The class also challenged the investigation as lacking in statutory authority under the Administrative Procedure Act, and argued that all aspects of the investigation, including the Form 42 request and the entire SF 85 questionnaire, were unconstitutional under the Fourth Amendment.

NASA Procedural Requirements incorporate the Personal Identity Verification ("PIV") standard promulgated by the Department of Commerce under Homeland Security Presidential Directive 12 ("HSPD-12").[9] These requirements mandate that every JPL contract employee undergo a National Agency Check with Inquiries ("NACI") before he can obtain the new identification badge required for access to JPL facilities. As part of a NACI, JPL employees must submit SF 85, which seeks a host of information subsequently checked against four government databases, and sign an Authorization for Release of Information which permits the government to collect information about the employee. *Nelson II,* 530 F.3d at 870-71. The government collects information through Form 42.[10] *Id.* at 871. Once the information has been collected, NASA determines whether an employee is "suitable" for continued access to its facilities. *See* 5 C.F.R. § 731.103(a) ("[The U.S. Office of Personnel Management] delegates to the heads of agencies authority for making suitability determinations and taking suitability actions."). Because Caltech established a policy that JPL employees who fail to obtain new identification badges will be terminated, a negative suitability determination results in the loss of employment with attendant harm to the employee's career.

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[9] HSPD-12 was issued in response to identity fraud concerns raised by the 9/11 Commission. It directed the U.S. Secretary of Commerce to develop a uniform "standard for secure and reliable forms of identification." Directive on Policy for a Common Identification Standard for Federal Employees and Contractors, 2004 Pub. Papers 1765, 1765 (Aug. 27, 2004).

[10] The information requested in SF 85 and Form 42 and the scope of the Authorization for Release of Information are described in our opinion. *See Nelson II,* 530 F.3d at 871.

There is nothing in the record to support Judge Callahan's statement that the government inquiry in Form 42 is limited in any way to information that class members "voluntarily turn over to third parties." The record demonstrates the contrary: the Authorization for Release of Information authorizes any investigator conducting a background check using Form 42 to obtain information not only from past employers, landlords, and educational institutions, but also from any other sources of information that the investigator wants to consider. And, contrary to Judge Kleinfeld's suggestion, the release specifically states that the investigation is *not* limited to these sources. "[T]he form invites the recipient to reveal *any* negative information of which he or she is aware," no matter how that "information" fell into the hands of the source. *Nelson II,* 530 F.3d at 881. Judge Kleinfeld also belabors the usefulness of open-ended questions when an employer interviews a potential employee, but misses the distinction between that necessary practice and the standardless and limitless mining of highly personal and employment-irrelevant data from third parties at issue here. There are serious questions as to whether such open-ended inquiries are invasive of privacy rights; reasonable reference checks and interviewing techniques, on the other hand, remain within the government's prerogative.

Moreover, the record suggests that the government will seek private information unrelated to employment and use such information to determine suitability for employment. At multiple meetings about the new procedures, class members specifically asked about the investigation's scope and the criteria analyzed to make the suitability determination. The program directors refused to answer questions about scope and criteria. The

only information class members were able to glean about the proposed use of SF 85 and Form 42 and the suitability determination came from a document accidentally posted on the JPL internal HSPD-12 website between about August 2, 2007, and September 11, 2007.

The document, entitled "Issue Characterization Chart," listed "sodomy," "carnal knowledge," "abusive language," "personality conflict," "bad check," "credit history," "physical health issues," and "mental, emotional, psychological or psychiatric issues" as suitability issues. The Issue Characterization Chart further indicates that "[h]omosexuality, in and of itself, while not a suitability issue, may be a security issue and *must be addressed completely,* when indications are present of possible susceptibility to coercion or blackmail" (emphasis added). Far from the minimally intrusive questions to former employers and named references that Judges Callahan and Kleinfeld portray, the record shows the very real potential for intrusions into undisclosed private sexual, financial, and health matters and the use of those private matters to determine job suitability. As our opinion states, "[t]he record is vague as to the exact extent to and manner in which the government will seek this information." *Id.* at 871.

Judge Callahan represents that the safety and security of federal facilities is implicated by enjoining the government from a limitless investigation into the class members' private lives. In a similar vein, Judge Kleinfeld suggests that our opinion "enjoin[ed] reasonable reference checks on applicants for federal government functions" in a manner "likely to impair national security." In addition to the fact that this accusation again mistakenly focuses on applicants, whereas our opinion

addressed existing employees, Judge Kleinfeld's and Judge Callahan's claims are simply unsupportable. Our opinion did not issue a blanket injunction against the use of Form 42—we held only that the use of this Form to investigate low risk, existing contract employees raises serious legal questions. The government is obviously free to continue reasonable reference checks, and is even free to utilize Form 42 when the government's legitimate interests in investigation are sufficiently great and when the government adheres to proper limiting standards that narrowly tailor its quest for information. The fact that this Form may be frequently and appropriately used in other contexts does not mean that it would be proper here. Further, the opinion does not "forbid[] the government from making inquiries," as Judge Kleinfeld suggests. Nor does it affect the government's ability to confirm identity, take fingerprints, run criminal records checks, or compel individuals to disclose prior drug use. It preliminarily enjoins the government only from compelling the disclosure of any and all drug counseling and treatment information and from investigating without limits into areas of class members' lives unrelated to employment.

Judge Kleinfeld's complaint that we failed to consider the public interest in national security is similarly misguided. Our explanation of the nature of plaintiffs' low risk positions which do not involve public safety or a significant risk for causing damage, *id.* at 880-81, our careful analysis of the nonsensitive nature of their work, *id.*, our admonition that our decision "would not affect NASA's ability to investigate [employees] in 'high risk' or 'moderate risk' positions," *id.* at 882, and the notation that many successful years passed before NASA decided

to implement NACI,[11] *id.*, reflect our reasoned decision that national security is not implicated by the grant of a preliminary injunction. It is also worth noting that throughout this litigation the government itself has never argued the public interest in national security as a justification for its proposed background investigation.

The JPL, a research laboratory run jointly by NASA and Caltech, is not a vulnerable facility desperately in need of stronger security measures. JPL is located approximately five minutes to the north of our Pasadena courthouse off Interstate 210, and a large freeway sign directs the traveling public to the facility. JPL operates as a university campus rather than as a high-security government facility, encouraging students, visiting scientists (often foreign nationals), and other members of the public to enter and tour the facilities. JPL regularly opens its doors to all members of the public. Tens of thousands of visitors have unrestricted access to the lab with no requirement that they present identification.

When visitors arrive at the campus, they encounter only cursory random inspections of cars. Guards wave passenger cars through and take a quick peek inside trucks and busses. Drivers of trucks with chemicals and equipment park on campus while their identity is verified by presentation of a driver's license. Once a driver's identity is checked, the truck driver pulls right up to the buildings, a privilege enjoyed by less than thirty percent of the permanently badged employees.

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[11] Judge Kleinfeld misreads the record when he asserts that our injunction "stops the government from making the inquiries it has been making for decades"—the government concedes that it sought to impose the wide-ranging background check only as of 2007.

There are no metal detectors and no inspections of handbags.

While there are millions of dollars in taxpayer money invested in this facility and its operations, any risk that may exist derives from the complexity and unknown character of the subjects of JPL's exploration, not security concerns. JPL protects expensive government equipment with Flight Project Practices that govern every aspect of a mission's design, development, testing, and operations. These Practices require all critical activities to be peer-reviewed and independently validated. They are not affected by the issuance of new identification badges.

While the preliminary injunction remains in effect, the public may rest assured that the class members, many of whom have worked at JPL and Caltech for twenty to thirty years, have undergone serious security checks, which the government found sufficient to safeguard our national space effort up until two years ago when it first decided to impose its proposed limitless inquiry. A temporary restriction against a standardless investigation of employment-irrelevant data will have little to no impact on JPL, in part because of the security measures already in effect.

JPL currently uses secure and reliable forms of identification that comply with HSPD-12. HSPD-12 defines "secure and reliable forms of identification" as identification that "(a) is issued based on sound criteria for verifying an individual employee's identity; (b) is strongly resistant to identity fraud, tampering, counterfeiting, and terrorist exploitation; (c) can be rapidly authenticated electronically; and (d) is issued only by providers whose reliability has been established by an official ac-

creditation process." 2004 Pub. Papers at 1766. Every contract employee entering the JPL facility must wear an appropriate badge that includes his photograph, an employee number, and a bar code. The "One NASA" badge, which NASA began issuing in response to HSPD-12, requires personal information, two forms of approved identification, and fingerprinting. The class does not challenge uniform identification measures or the requirements for obtaining a "One NASA" badge.

Judges Callahan and Kleinfeld fail to articulate how the two narrow aspects of the additional investigation sought by the government and temporarily enjoined impair national security. Surely, whether a Caltech scientist had "carnal knowledge," a personality conflict, or used abusive language at home would not impact our national security. Put another way, the dissenters (other than Judge Kozinski) seem to be suggesting that the government has an unlimited right to violate the most fundamental privacy interests of its contract employees because almost anything might affect national security. At a minimum, this is a serious legal question. That NASA has existed for more than fifty years without these inquiries, *see Nelson II,* 530 F.3d at 871, that the challenged program was implemented almost eight years after the government determined it should have more complete screening of contract employees, *id.*, and that class members are long-term employees of JPL who have previously undergone significant security checks, suggest that remand was appropriate to develop the record further and to allow class members to pursue their claim on an orderly basis.

II.

Judge Callahan asserts that our opinion diverges from the reasoning of two decisions by our sister circuits, *National Treasury Employees Union v. U.S. Department of Treasury,* 25 F.3d 237 (5th Cir. 1994), and *American Federation of Government Employees v. Department of Housing and Urban Development,* 118 F.3d 786 (D.C. Cir. 1997). Judge Callahan is incorrect. Both decisions are specifically grounded in the diminished privacy interests of individuals in public trust positions—positions not held by the low risk contract employees here.

In *National Treasury,* the Fifth Circuit recognized the constitutional right to privacy, stating that "[t]he extent to which an individual's expectation of privacy in the employment context is reasonable depends, in significant part, upon the employee's position and duties." 25 F.3d at 243-44. The Fifth Circuit emphasized that the plaintiffs, all of whom held positions at the high and moderate risk levels, were "public trust employees." *Id*. at 244. Public trust positions "involve policy-making, major program responsibility, public safety and health, law enforcement duties, fiduciary responsibilities or other duties demanding a significant degree of public trust, and positions involving access to or operation or control of financial records, with a significant risk for causing damage or realizing personal gain." 5 C.F.R. § 731.106(b). Because "public trust employees know that they have diminished rights to withhold personal information that compromises the right of the public to repose trust and confidence in them," the Fifth Circuit concluded that they must complete the Standard Form 85P, Questionnaire for Public Trust Positions ("SF

85P"). *Nat'l Treasury,* 25 F.3d at 244. The Fifth Circuit also stated, "[w]e take pains to underscore the obvious: we are determining rights of [plaintiffs] in their capacity as public trust employees and certainly not in their role as ordinary private citizens." *Id.*

In *American Federation,* the D.C. Circuit also considered informational privacy in the context of public trust employees. 118 F.3d at 788. There, employees were found to be in public trust positions because of their access to a database that controlled $10 billion in annual government disbursements. *Id.* The D.C. Circuit analyzed each of the challenged questions, as we did in our opinion, and concluded that the agency provided "sufficiently important justifications for each item on the questionnaires" in light of the employees' diminished expectation of privacy as public trust employees. *Id.* at 793.

The class members here are low risk and thus do not have the diminished expectation of privacy of public trust employees. The class expressly excludes employees who have been designated as moderate or high risk. Many class members agreed to work for NASA with the understanding that they would not be required to work on classified materials or to obtain security clearances—precisely because they desired that their work remain in the public domain. Avoiding classified materials allows these scientists to subject their work to peer review, to collaborate with the best scientists worldwide, and to publish their results.

Although the Fifth and D.C. Circuits recognized that one factor that can diminish an individual's privacy interest is whether the information collected by the government is disseminated publicly, *Nat'l Treasury,*

25 F.3d at 244; *Am. Fed'n,* 118 F.3d at 793, neither one found that to be the dispositive factor. Each court held that constitutional interests were not violated because the protections against the disclosure of private information were combined with other important factors, such as the diminished expectation of privacy by individuals holding public trust positions. *Nat'l Treasury,* 25 F.3d at 244; *Am. Fed'n,* 118 F.3d at 794. Our opinion also recognizes that "[a]lthough the risk of public disclosure is undoubtedly an important consideration in our analysis, it is only one of many factors that we should consider." *Nelson II,* 530 F.3d at 880 (citation omitted). Moreover, plaintiffs have been informed that the information will be disclosed to Caltech, raising serious questions as to whether their privacy interest is diminished by this factor.

Finally, both *National Treasury* and *American Federation* were decided on a fully developed factual record that included a reasoned decision of the district court. The evidentiary record was critical to the courts' decisions. For example, after the district court held that an authorization similar to that in SF 85 violated the plaintiffs' constitutional right to informational privacy in *American Federation,* the D.C. Circuit reversed based on a government representation "that the legitimate use of the release form is limited to verifying information solicited by other parts of the form," and a finding that "the release authorizes the government to collect only information 'relevant' to determining the fitness of an individual for a public trust position." *Am. Fed'n,* 118 F.3d at 794. In contrast, here, the government "steadfastly refused to provide any standards narrowly tailoring the investigation to the legitimate interests they offer as justification," failing to limit the investigation to

relevant information or the verification of responses. *Nelson II,* 530 F.3d at 881.

III.

Chief Judge Kozinski's dissent thoughtfully raises a number of considerations to be taken into account in shaping the right of informational privacy. By asking a series of provocative questions about the doctrine, however, he only underscores our panel's conclusions that serious questions were raised justifying the preliminary injunction. *See Walczak,* 198 F.3d at 731. Ultimately, I disagree with his conclusion that we should have taken this case en banc to provide further guideposts towards resolving those questions. Erecting guideposts on a moving playing field would prove futile. Only a fully developed factual record, such as the one in *National Treasury* or *American Federation,* will allow us to thoroughly consider the nature of the privacy rights at issue and provide the clarity Judge Kozinski seeks.

We recognized in our opinion the distinction Judge Kozinski proposes between government collection and disclosure of information. As previously noted, we stated that "[a]lthough the risk of public disclosure is undoubtedly an important consideration in our analysis, it is only one of many factors that we should consider." *Nelson II,* 530 F.3d at 880 (citation omitted). It is not yet clear on this record, however, whether the government intends to disclose the information it collects. The class has specifically alleged that NASA will share the information collected with Caltech and possibly with other government agencies. Sharing this information with Caltech and other agencies is a potential violation of the Privacy Act. *See* 5 U.S.C. § 552a(b) (forbidding

agency disclosure of records "to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains"). Moreover, if the information is shared, Caltech is not precluded by the Privacy Act from further disseminating it.

Judge Kozinski also distinguishes between disclosures that the target may refuse and those imposed regardless of his consent. I agree that during the application process for a new job, disclosures may be refused simply by seeking other employment. In that context, requested disclosures may be inherently less invasive. Here, however, we have long-term employees suddenly forced to sign releases authorizing investigation into every aspect of their private lives or lose their jobs. As a practical matter, given the current economic environment, the unique nature of the work conducted at JPL, and the age and seniority of the plaintiff-employees, this is tantamount to a deprivation of the ability to obtain any future employment.

Judge Kozinski's third distinction—the difference between protecting fundamental rights and protecting a free-standing right not to have the world know bad things about you—would also be addressed more precisely with further record development. It appears, although it has yet to be conclusively proven, that the government intends to pry into constitutionally protected private matters. The Issue Characterization Chart suggests that sexual preference, sexual activity, medical treatment, counseling, and personal financial matters are at issue in the government's investigation. The Supreme Court has recognized a constitutional "interest in avoiding disclosure of personal matters," *Whalen v. Roe,*

429 U.S. 589, 591-93, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977), and we and our sister circuits have defined this right to include the very types of matters implicated by the Issue Characterization Chart, *see, e.g., Sterling v. Borough of Minersville,* 232 F.3d 190, 196 n.4 (3d Cir. 2000) ("While we have not previously confronted whether forced disclosure of one's sexual orientation would be protected by the right to privacy, we agree with other courts concluding that such information is intrinsically private."); *Statharos v. N.Y. City Taxi & Limousine Comm'n,* 198 F.3d 317, 322-23 (2d Cir. 1999) ("[T]his Court has recognized the existence of a constitutionally protected interest in the confidentiality of personal financial information."); *Norman-Bloodsaw,* 135 F.3d at 1269 ("The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality."); *Eastwood v. Dep't of Corr.,* 846 F.2d 627, 631 (10th Cir. 1988) ("This constitutionally protected right [to privacy] is implicated when an individual is forced to disclose information regarding personal sexual matters."); *Thorne,* 726 F.2d at 468 ("The interest [the plaintiff] raises in the privacy of her sexual activities are within the zone protected by the constitution.").[12]

Similarly, the parties have yet to develop an evidentiary record as to whether the government intends to "dig into records" or simply to contact third parties. The government states that it would need another re-

[12] *Bloch v. Ribar,* 156 F.3d 673 (6th Cir. 1998), the case cited by Judge Kozinski to illustrate this third distinction, suggests that intimate details about sexuality and choices about sex are the type of private matters which implicate the constitutional right to privacy. *Id*. at 685. How these private matters play into this dispute requires further factual development.

lease to obtain medical records. However, the Authorization for Release of Information allows the government "to obtain any information relating to [a class member's] activities from . . . other sources of information" and to seek information that "is not limited to" job-related activities. The Issue Characterization Chart suggests that the government may pursue the more invasive of these two approaches. There is no evidence of what standards, if any, the government intends to apply.

Further record development is also required to determine whether the government is in fact acting as any other "private" employer. By unilaterally imposing the new requirements upon Caltech in the interest of securing federal facilities, the government is using special powers that are available to it only in its sovereign capacity. Private contracting parties would not have the ability to insist upon one-sided contract modifications that result in termination of a partner's employees of twenty or thirty years. Moreover, it appears that NASA—not Caltech—will make the suitability determination, but again, the class has not yet had the opportunity to submit evidence on this point.

We must rule on the record we have before us. Our ability to "clear the brush" will be enhanced when the record is fully developed. Even the Supreme Court would find it a much surer task to outline the contours of the doctrine of informational privacy with some of Judge Kozinski's questions actually answered. Therefore, I concur in the denial of en banc rehearing, and await the next round.

CALLAHAN, Circuit Judge, with whom KLEINFELD, TALLMAN and BEA, Circuit Judges, join, dissenting from the denial of rehearing en banc:

This case places before the court an issue of exceptional importance: the degree to which the government can protect the safety and security of federal facilities. With an annual budget of over $1.6 billion, NASA's Jet Propulsion Laboratory ("JPL") is the foremost leader in exploring the solar system's known planets with robotic spacecraft. As the lead center for NASA's deep space robotics and deep space communications missions, the science and technology developed at JPL for each mission entails extensive planning, research, and development, spanning years and costing taxpayers hundreds of millions of dollars. The technology developed at JPL features some of the most sensitive and expensive equipment owned by NASA, which involves a myriad of scientific, medical, industrial, commercial, and military uses.

Plaintiffs, twenty-eight scientists and engineers employed as contractors at JPL, object to NASA's requirement that they undergo the same personnel investigation for non-sensitive contract employees as those already in existence for all civil service employees in non-sensitive positions. Although the district court denied a motion for a preliminary injunction designed to prevent these personnel investigations from taking place, a panel of this court reversed, concluding that the district court's decision was based on legal errors. *See Nelson v. NASA,* 530 F.3d 865 (9th Cir. 2008). The panel held that a questionnaire asking applicants about treatment or counseling received for illegal drug use within the past year and a related written inquiry sent to references implicate the constitutional right to infor-

mational privacy. *See id*. at 879. Applying intermediate scrutiny, the panel held that the government did not have a legitimate state interest in asking applicants to disclose their drug treatment or counseling history, *id*., and that the written inquiry was not narrowly tailored to serve the government's legitimate interests related to the security of JPL. *Id*. at 879-81.

I dissent from the denial of rehearing en banc because the panel's opinion constitutes an unprecedented expansion of the constitutional right to informational privacy. Further, assuming that the panel's opinion correctly assesses the scope of this right, it does not properly apply intermediate scrutiny. This expansion of constitutional privacy rights reaches well beyond this case and may undermine personnel background investigations performed daily by federal, state, and local governments.

Until now, no court had held that applicants have a constitutionally protected right to privacy in information disclosed by employment references. The Supreme Court has consistently held that individuals do not have a legitimate expectation of privacy in information they voluntarily turn over to third parties. *See, e.g., Smith v. Maryland,* 442 U.S. 735, 743-44, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979); *United States v. Miller,* 425 U.S. 435, 442-44, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976). Similarly, no court had previously held that a government employee has a constitutionally protected right to privacy to prevent the disclosure of treatment or counseling received for illegal drug use in the face of a legitimate need by the employer to protect the safety and security of a facility. *Cf. Mangels v. Pena,* 789 F.2d 836, 839 (10th Cir. 1986) (finding that disclosure of drug use can-

not violate constitutional right to informational privacy). Thus, the panel's opinion effects an unwarranted extension of the constitutional right to informational privacy.

Even assuming that a constitutional right to information privacy is implicated here, the panel fails to engage in the requisite "delicate balancing" of plaintiffs' privacy rights and NASA's legitimate need for information ensuring that those it trusts with access to JPL do not pose an unacceptable safety and security risk. The panel's opinion sets our circuit apart from the District of Columbia Circuit and Fifth Circuit, both of which have rejected privacy-based challenges to background checks similar to, or more intrusive than, the one here. *See Am. Fed'n of Gov't Employees v. Dep't of Hous. & Urban Dev.,* 118 F.3d 786 (D.C. Cir. 1997); *Nat'l Treasury Employees Union v. U.S. Dep't of Treasury,* 25 F.3d 237 (5th Cir. 1994). These circuits emphasized that the information to be disclosed to the government in those cases would not be disclosed to the public; indeed, the D.C. Circuit recognized that even if a constitutional right to informational privacy is implicated, the Privacy Act, 5 U.S.C. § 552a(b), adequately safeguards against public disclosure.

I. Factual Background

A. Work conducted at the JPL facilities

JPL is a NASA facility that the California Institute of Technology ("Caltech") operates pursuant to a contract with NASA, and its facilities are an integral part of the nation's space program. JPL is the lead center for NASA's deep space robotics and deep space communications missions, which require broad access to many NASA physical and logical facilities. These missions en-

tail "extensive and detailed parallel planning, research, and development, often spanning years, scores of persons, and hundreds of millions of taxpayer dollars." JPL's discoveries have provided new insights into studies of the Earth, its atmosphere, climate, oceans, geology, and the biosphere; created the most accurate topographic map of the Earth; provided insight into global climate and ozone depletion; launched an oceanographic satellite to provide new details about the ocean seafloor; and provided space-based operational, communication, and information processing for the Defense Department. JPL operates a number of high profile projects including the Phoenix Mars Lander Mission, the Mars Exploration Rovers Mission, the Cassini Equinox Mission to Saturn, and the Voyager Mission to Jupiter, Saturn and beyond. The command center for the Mars Rovers, the Space Flight Operations Center for JPL missions, and JPL's Space Craft Assembly building are located on the JPL campus. JPL also partially manages the Deep Space Network, which is responsible for monitoring and communicating with numerous satellites and other space missions, and is involved in other highly confidential projects. All positions at JPL, from administrative support to engineers, scientists, and JPL's Director, are filled by contract employees.[1] Plaintiffs are scientists and engineers employed in some of the most important positions at JPL, including the remote operator of the Spirit and Opportunity Rovers that explore the surface of Mars and a navigation team member for the Phoenix Mars Lander Mission.

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[1] Caltech has filled JPL positions with about 5,000 of its own employees and with over 4,000 "affiliates" and contractors.

B. Implementation of Homeland Security Presidential Directive 12

The 9/11 Commission found that "[a]ll but one of the 9/11 hijackers acquired some form of U.S. identification document, some by fraud," and recommended that the federal government set standards for the issuance of identification because identification fraud is a concern at "vulnerable facilities." THE 9/11 COMMISSION REPORT 390 (2004). On August 27, 2004, the President of the United States issued Homeland Security Presidential Directive 12 ("HSPD-12") in response to security concerns identified by the 9/11 Commission Report and mandated that the Commerce Department develop a uniform federal standard, applicable to federal employees and contractors alike, for secure and reliable forms of identification. The order emphasized that the Commerce Department should act to eliminate the "[w]ide variations in the quality and security of forms of identification used to gain access to secure Federal and other facilities where there is potential for terrorist attacks. . . ." HSPD-12 ¶ 1.

Acting pursuant to this directive, the Commerce Department promulgated Federal Information Processing Standards ("FIPS") 201 and 201-1, which required security measures for contract employees commensurate with those applicable to comparable federal employees. FIPS 201-1 sets forth a standard for "identification issued by Federal departments and agencies to Federal employees and contractors (including contractor employees) for gaining physical access to federally-controlled facilities and logical access to Federally controlled information systems."

Since 1953, federal civil service employees have been subject to mandatory background investigations, with the scope varying based on the potential for adverse security consequences associated with a particular position. *See* Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 29, 1953), *reprinted as amended in* 5 U.S.C. § 7311 (2007). Thus, for over fifty years, Executive Order 10,450 has required that "in no event shall the investigation [of civil service employees] include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person." *Id.* § 3(a). Now, under FIPS 201-1, federal contractors in non-sensitive positions must meet these same minimum security guidelines.

In 2001, before the promulgation of FIPS 201, NASA conducted an internal review of contractor security requirements and concluded that the failure of contractors to undergo background checks posed a vulnerability. NASA, acting pursuant to its statutory authority under the National Aeronautics and Space Act of 1958 (the "Space Act") to conduct "personnel investigations," revised NASA Procedural Requirement ("NPR") 1600.1, to require application of security requirements for contract employees parallel to those of federal employees. On November 8, 2005, NASA updated NPR 1600.1 to incorporate FIPS 201 and require that all low risk contractors be subject to a National Agency Check with Inquiries ("NACI") prior to the issuance of permanent NASA photo-identification. NASA explained that these requirements would "assist NASA Centers and component facilities in executing the NASA security program

to protect people, property, and information" by establishing "security program standards and specifications necessary to achieve Agency-wide security program consistency and uniformity." NPR 1600.1, § P.1.

Meanwhile, on August 5, 2005, the Office of Management and Budget ("OMB") provided guidance on the implementation of HSPD-12, requiring agencies "develop a plan and begin the required background investigations for all current contractors who do not have a successfully adjudicated investigation on record . . . no later than October 27, 2007." Memorandum from OMB on Implementation of Homeland Sec. Presidential Directive (HSPD) 12-Policy for a Common Identification Standard for Fed. Employees and Contractors 6 (Aug. 5, 2005). OMB stated that the completion of a NACI would be a prerequisite to the issuance of any identification. *Id.* at 5. Across all NASA facilities, over 57,000 individuals are subject to these new requirements, over 46,000 had applied as of August 31, 2007, and approximately 39,000 NASA contractors had completed the background investigation as of September 21, 2007.

C. The SF-85 Questionnaire and the Form 42 inquiries

The NACI requires the completion of a SF-85 Questionnaire, which asks the applicant to answer basic questions regarding citizenship, previous residences over the past five years, educational background, employment history over the past five years, selective service record, military history, and illegal drug use over the

past year.[2] The panel took issue with Question # 14, which asks:

> In the last year, have you used, possessed, supplied, or manufactured illegal drugs? When used without a prescription, illegal drugs include marijuana, cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), stimulants (cocaine, amphetamines, etc.), depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.). (NOTE: Neither your truthful response nor information derived from your response will be used as evidence against you in any subsequent criminal proceeding.)
>
> If you answered "Yes," provide information relating to the types of substance(s), the nature of the activity, and any other details relating to your involvement with illegal drugs. Include any treatment or counseling received.

The SF-85 also asks for three references who know the applicant well. Form 42 written inquiries are then sent to educational institutions, former employers, landlords, and the designated references in order to verify the information on the SF-85 and confirm the applicant's trustworthiness and compliance with the law. Question # 7 on Form 42 asks references to indicate either "Yes" or "No" as to whether they "have any adverse information about this person's employment, residence or activities concerning:" "Violations of the Law," "Financial Integrity," "Abuse of Alcohol and/or Drugs," "Mental or

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[2] The SF-85 also includes an "Authorization for Release of Information," which may be used only for purposes of the SF-85 and is limited by the Privacy Act.

Emotional Stability," "General Behavior or Conduct," or "Other Matters." References are then asked whether they "wish to discuss the adverse information [they] have." If so, they can provide "additional information which [they] feel may have a bearing on this person's suitability for government employment or a security clearance. This space may be used for derogatory as well as positive information." Form 42 written inquiries are sent to roughly 980,000 recipients annually. 70 Fed. Reg. 61,320 (Oct. 21, 2005).

D. Procedural History

Plaintiffs filed suit on August 30, 2007, and subsequently moved for a preliminary injunction. The district court denied the plaintiffs' motion on a number of grounds, rejecting the plaintiffs' claims that NASA lacked the statutory authority to conduct these investigations, and that the NACI violated plaintiffs' informational privacy rights. The district court found that the NACI served a legitimate governmental interest, *i.e.,* to enhance security at federal facilities. Finding the NACI narrowly tailored with adequate safeguards in place, the court concluded that the government must be given some leeway in conducting its investigation to verify that applicants are not connected to activities that pose a security threat.

Plaintiffs filed an emergency motion for a stay of the district court's order. A panel of this court granted a temporary stay pending appeal. *Nelson v. NASA,* 506 F.3d 713 (9th Cir. 2007). Following an expedited briefing schedule and argument, a merits panel held that the district court abused its discretion and reversed the de-

nial of the preliminary injunction. *Nelson v. NASA,* 512 F.3d 1134 (9th Cir. 2008).

Subsequently, the panel vacated its opinion and filed a superseding opinion. *Nelson v. NASA,* 530 F.3d 865 (9th Cir. 2008) ("*Nelson II*"). The panel's opinion concludes that "the Space Act appears to grant NASA the statutory authority to require the [background] investigations," *id.* at 875, and that the portion of SF-85's Question # 14 requiring disclosure of prior drug use, possession, supply, and manufacture does not violate the plaintiffs' constitutional right to informational privacy. *Id.* at 878-79. However, the panel held that the portion of SF-85's Question # 14 requiring applicants to disclose "any treatment or counseling received" for illegal drug use, *id.* at 879, and Form 42's written inquiries violate the plaintiffs' constitutional right to informational privacy. *Id.* at 879-81. Accordingly, the panel concluded that "[t]he district court's denial of the preliminary injunction was based on errors of law and hence was an abuse of discretion" and ordered the district court to issue an injunction. *Id.* at 883.

II. Discussion

A. The panel's expansion of the constitutional right to informational privacy is unprecedented

While the Supreme Court has never clearly addressed whether there is a constitutional right of privacy in the non-disclosure of personal information, *see Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977); *Whalen v. Roe,* 429 U.S. 589, 605-06, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977), this circuit—along with a majority of other circuits—has

found a limited right to informational privacy.[3] *See In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999). We have said that constitutionally protected privacy interests include "avoiding disclosure of personal matters" and an "interest in independence in making certain kinds of important decisions." *Id*. (citations omitted). "The right to informational privacy, however, is not absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest." *Id*. at 959 (internal quotation marks and citation omitted). Where a constitutional right to informational privacy is implicated, we apply intermediate scrutiny, which requires the government to show that "its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Id*. (internal quotation marks and citation omitted).

For example, we have held that an employer's nonconsensual pre-employment blood testing for syphilis, sickle cell genetic trait, and pregnancy implicated a constitutionally protected privacy interest in avoiding disclosure of personal, confidential medical information. *See Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269-70 (9th Cir. 1998). We have also held that a physician has a right to privacy in revealing whe-

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[3] The Sixth Circuit appears to be the only circuit to reject this view. *See Cutshall v. Sundquist*, 193 F.3d 466, 481 (6th Cir. 1999). In addition, recognizing that it was not writing on a "blank slate" because earlier decisions indicated that such a right existed, the District of Columbia Circuit has expressed "grave doubts" as to the existence of a federal right of confidentiality. *See Am. Fed'n of Gov't Employees*, 118 F.3d at 791. The First Circuit has similarly expressed concern, but declined to address the issue. *See Borucki v. Ryan*, 827 F.2d 836, 841-42 (1st Cir. 1987).

ther he or she has AIDS to prospective patients. *See Doe v. Att'y Gen.*, 941 F.2d 780, 796 (9th Cir. 1991). Further, we have held that a female minor has a privacy interest in avoiding disclosure of the fact that she is pregnant as part of a judicial bypass proceeding used as an alternative to parental consent. *See Planned Parenthood of S. Ariz. v. Lawall,* 307 F.3d 783, 789-90 (9th Cir. 2002). We have also stated that questions during a polygraph given to a police officer applicant asking about a possible abortion and the identity of her sexual partners implicated this privacy right. *See Thorne v. City of El Segundo,* 726 F.2d 459, 468 (9th Cir. 1983). And, we have held that a constitutional right of informational privacy may extend to the indiscriminate public disclosure of social security numbers out of a fear of identity theft. *See In re Crawford,* 194 F.3d at 958. Never before, however, has a court concluded that a government worker employed in a secure facility has a constitutional right of privacy to prevent the government from inquiring into whether that employee has received drug treatment within the past year or to prevent the government from sending a questionnaire to references in order to verify the veracity of the employee.

1. There is no expectation of privacy in information disclosed by a designated reference responding to a questionnaire

The panel's opinion concludes that individuals have a constitutionally protected right to privacy in information disclosed to third-party employment references. No other court has held as much, and for good reason—the Supreme Court "consistently has held that a person has no legitimate expectation of privacy in information

he voluntarily turns over to third parties." *Smith,* 442 U.S. at 743-44, 99 S. Ct. 2577 (citing *Miller,* 425 U.S. at 442-44, 96 S. Ct. 1619; *Couch v. United States,* 409 U.S. 322, 335-36, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973); *United States v. White,* 401 U.S. 745, 752, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971) (plurality opinion); *Hoffa v. United States,* 385 U.S. 293, 302, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966); *Lopez v. United States,* 373 U.S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963)); *see also SEC v. O'Brien,* 467 U.S. 735, 743, 104 S. Ct. 2720, 81 L. Ed. 2d 615 (1984) (same). For example, the *Miller* Court held that a bank depositor did not have an expectation of privacy in financial information that he voluntarily turned over to banks and their employees in the normal course of business. The Court explained:

> The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. *This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities,* even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

425 U.S. at 443, 96 S. Ct. 1619 (emphasis added and citations omitted). Absent some privilege (*e.g.,* attorney-client, physician-patient, priest-penitent, marital, etc.), an applicant does not have an expectation of privacy to information disclosed by a reference.

The panel concludes that Fourth Amendment case law defining whether an individual has an expectation of privacy over information that he has already dissemi-

nated to the public is not the proper focus in the evaluation of information privacy rights and contends that, instead, we should focus on the general nature of the information sought. *See Nelson II,* 530 F.3d at 880 n.5. Although I agree with the panel that the constitutional right to informational privacy is not limited to Fourth Amendment searches, *see, e.g., Thorne,* 726 F.2d at 468 (questions during a polygraph to a police applicant), I disagree with the suggestion that whether an individual has an expectation of privacy under a constitutional right to informational privacy is not informed by Supreme Court case law interpreting an expectation of privacy under the Fourth Amendment. In fact, one of the Supreme Court's first decisions recognizing a constitutional right to informational privacy specifically cited to Fourth Amendment case law in defining this right. *See Nixon,* 433 U.S. at 457-58, 97 S. Ct. 2777 (citing *Katz v. United States,* 389 U.S. 347, 351-53, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), in evaluating whether President Nixon had a legitimate expectation of privacy over presidential papers and tape recordings).

The panel's expansion of the constitutional right to privacy and what constitutes a legitimate expectation of privacy is unprecedented. The Supreme Court has planted a set of "guideposts for responsible decisionmaking" concerning limited fundamental rights "deeply rooted in this Nation's history and tradition" in an attempt "to rein in the subjective elements that are necessarily present in due-process judicial review." *Washington v. Glucksberg,* 521 U.S. 702, 720-22, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (citations and quotation marks omitted). "[I]n addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to

marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Id.* at 720, 117 S. Ct. 2258 (citations omitted); *see also Thorne,* 726 F.2d at 468 (stating that informational privacy claims must fall within the zone protected by the constitution). "[E]stablishing a threshold requirement . . . avoids the need for complex balancing of competing interests in every case." *Glucksberg,* 521 U.S. at 722, 117 S. Ct. 2258. The panel's opinion expands the right to informational privacy by elevating personnel investigations to the realm of constitutional protection.

The panel's opinion opens the doors to lawsuits against employers who perform standard reference checks to ensure that applicants are suitable candidates for employment. In an area where States have sought measures to promote the free flow of information, *see, e.g., Noel v. River Hills Wilsons, Inc.,* 113 Cal. App. 4th 1363, 7 Cal. Rptr. 3d 216, 220-21 (Ct. App. 2003) (recognizing that a California state statute extending a conditional privilege against defamatory statements applies in the employment context), the panel's opinion will have the opposite effect.

The panel's opinion also fails to adhere to the Supreme Court's recent admonition that there is "a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist v. Or. Dep't of Agric.,* — U.S. —, —, 128 S. Ct. 2146, 2151, 170 L. Ed. 2d 975 (2008) (quoting *Cafeteria & Rest. Workers v. McElroy,* 367 U.S. 886, 896, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961) (rejecting Fifth Amend-

ment due process claim of civilian contractor summarily denied access to military facility for security reasons)). As the Court stated in *Engquist,* "in striking the appropriate balance" between employee rights and the government's needs as an employer, courts should "consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer." *Id.* at 2152.

The constitutional right to informational privacy allows individuals to safeguard certain private information—like the fact that they have had an abortion or have contracted AIDS—and ensures that those wishing to keep such information from the eyes and ears of others can do so. However, those individuals that disclose such information to people like their landlords or employers lack any expectation that such information will be kept private. For this reason, plaintiffs have no expectation of privacy with respect to the Form 42 written inquiries.

2. There is no expectation of privacy for prior drug treatment or counseling when seeking employment with the government

The panel's opinion recognizes that the constitutional right to informational privacy does not protect an applicant from having to disclose to the government in a background investigation whether they have used, possessed, supplied, or manufactured illegal drugs within the past year. *Nelson II,* 530 F.3d at 878-79. However, the panel maintains that the plaintiffs are likely to succeed on their informational privacy challenge to a

follow-up question regarding the disclosure of "any treatment or counseling received" for illegal drug use once an applicant acknowledges involvement with illegal drugs in the past year. *Id*. at 879.

The panel's position is predicated on the assertion that "[i]nformation relating to medical treatment and psychological counseling fall squarely within the domain protected by the constitutional right to informational privacy." *Id*. (citing *Norman-Bloodsaw,* 135 F.3d at 1269, and *Doe,* 941 F.2d at 796). However, the authority the panel cites—*Norman-Bloodsaw* and *Doe*—respectively deal with the "highly private and sensitive medical and genetic information" from non-consensual pre-employment blood testing for syphilis, sickle cell genetic trait, and pregnancy, *see Norman-Bloodsaw,* 135 F.3d at 1264, 1269, and whether a doctor must disclose to patients that he has AIDS, *see Doe,* 941 F.2d at 796. We held in those cases that the constitutional right to informational privacy protects those individuals from having such highly private medical information enter the public domain. But here, the panel agrees that an applicant does not have a constitutional right to shield from the government the fact that he has used illegal drugs.

In *National Treasury Employees Union,* the Fifth Circuit noted that a public employee's expectation of privacy "depends, in part, upon society's established values and its expectations of its public servants, as reflected in our representative government." 25 F.3d at 243. Observing that "[t]oday's society has made the bold and unequivocal statement that illegal substance abuse will not be tolerated," the court held that "[s]urely anyone who works for the government has a diminished expectation that his drug and alcohol abuse history can be

kept secret, given that he works for the very government that has declared war on substance abuse." *Id*. I see no principled distinction between an applicant having to disclose that he has used illegal drugs and having to additionally indicate whether he sought treatment or counseling for illegal drug use. In *Mangels,* the Tenth Circuit, assessing the constitutionality of a requirement of public disclosure of illegal drug use by firefighters, stated "[t]he possession of contraband drugs does not implicate any aspect of personal identity which, under prevailing precedent, is entitled to constitutional protection. Validly enacted drug laws put citizens on notice that this realm is not a private one." 789 F.2d at 839 (citation omitted).

B. Even assuming that a constitutional right to privacy is implicated, NASA's procedures should be upheld because they are narrowly tailored to meet legitimate state interests.

Even if the SF-85's questions and Form 42 inquiries implicate a constitutional right to information privacy, the panel opinion's analysis does not give adequate weight to NASA's need for this information to ensure that those it trusts with access to JPL do not pose an unacceptable risk to the safety and security of the facility. It also fails to appreciate the fact that NASA's actions are narrowly tailored because the Privacy Act prevents public disclosure of this information.

1. Safety and security are legitimate state interests.

The panel's opinion acknowledges that NASA has a legitimate government interest in conducting background investigations. NASA must "protect its facilities

and their occupants from harm and its information and technology from improper disclosure." NPR 1600.1, § 4.1.1. In order to "ensure maximum protection of NASA assets," NASA determined that the security requirements for contractors should "be equitable with the employment suitability criteria for NASA Civil Service employees" and "be uniformly and consistently applied." *Id*. § 4.2.3.

The NACI has two components: the National Agency Check ("NAC"), which requires the completion of a SF-85, and the Form 42 Inquiries. Although a standard NAC checks name and fingerprint databases, the government determined that this was insufficient to accomplish the security objectives of HSPD-12 because these database checks would detect only individuals whose fingerprints are on file at the FBI or individuals for whom there is a known history with law enforcement or other government agencies. Thus, the government determined that a NACI was necessary because Form 42's written inquiries would help verify information on an employee's SF-85. The information would confirm or raise questions as to the applicant's trustworthiness and compliance with the law. The NACI provides a disincentive to using false information by subjecting an applicant to a potential perjury charge, and also creates a means by which the government can readily verify the validity of information entered onto the SF-85. This substantially improves the probability of detecting individuals claiming a false identity.

NASA has a legitimate need to ensure that those it trusts with access to its facilities do not pose an unacceptable risk to the safety and security of its costly equipment or its personnel. The work performed by the

plaintiffs at JPL involves some of the most sensitive and important technology developed by NASA, and implicates significant taxpayer money. Once individuals pass through one of the three main entrances, they have access to most of the facility and, while they may not be able to enter areas where classified work is actually being done, they can travel unescorted to any building on JPL's campus. Also, a NASA identification badge will ordinarily give access to other NASA facilities, and depending on other agencies' practices, access to other federal facilities. Accordingly, NASA must be able to ensure that those given identification badges meet at least minimum security guidelines.

2. NASA's procedures are narrowly tailored.

Balancing NASA's legitimate needs for this information with plaintiffs' right to keep this information private requires that we look to the "overall context." *See In re Crawford,* 194 F.3d at 959. Our engagement in the "delicate task of weighing competing interests" requires that we consider such factors as:

> the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Id. (quoting *Doe v. Attorney Gen.,* 941 F.2d at 796).

The panel's opinion makes our circuit the first one to find that a background security questionnaire violates a constitutional right of privacy, and diverges from the reasoning of the D.C. and Fifth Circuits, both of which have rejected privacy-based challenges to background checks similar to, or more intrusive than, the one here. In *American Federation of Government Employees,* the D.C. Circuit held that, assuming a constitutional right to privacy even existed, the government "presented sufficiently weighty interests in obtaining the information sought by the questionnaires to justify the intrusions into their employees' privacy." 118 F.3d at 793. The background investigations at issue included the more extensive SF-85P Public Trust Positions and the SF-86 Sensitive Questionnaires. Significantly, the D.C. Circuit held that "the individual interest in protecting the privacy of the information sought by the government is significantly less important where the information is collected by the government but not disseminated publicly." *Id.* (noting that "the employees could cite no case in which a court has found a violation of the constitutional right to privacy where the government has collected, but not disseminated, the information").

The Fifth Circuit similarly found that the government employees in that case had no reasonable expectation of privacy in keeping confidential the information requested in the SF-85P Questionnaire. *See Nat'l Treasury Employees Union,* 25 F.3d at 244. The Fifth Circuit observed that the questionnaire requires the employees "only to disclose information to the [government], as their employer—not to anyone else, and certainly not to the public." *Id.*

The panel's opinion disregards the distinction between a privacy interest in avoiding *collection* of information by the government and an interest in avoiding *disclosure* by the government—a distinction recognized by both the D.C. and Fifth Circuits. This distinction is critical to this case because the government has provided adequate safeguards to ensure that the information is not disseminated to the public. The Privacy Act protects the information collected from public and/or unauthorized access and disclosure. *See* 5 U.S.C. § 552a(b). Courts have routinely held that security provisions designed to prevent the public disclosure of protected information weigh heavily in favor of the government. *See Whalen,* 429 U.S. at 601-02, 97 S. Ct. 869 (finding that extensive security procedures required by statute and regulation substantially reduce employees' privacy interests); *Lawall,* 307 F.3d at 790 (statute contained adequate protection to prevent unauthorized disclosure of abortion by minor female). In *American Federation of Government Employees,* the D.C. Circuit found it significant that the Privacy Act prohibited public dissemination of the information obtained in personnel background investigations. 118 F.3d at 793. The court was satisfied that the protections of the Privacy Act substantially reduced the employees' privacy interests. *Id.* at 793; *see also Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia,* 812 F.2d 105, 118 (3d Cir. 1987) (holding "complete absence of comparable protection of the confidential information to be disclosed in response to the . . . questionnaire" was a significant factor in finding violation of right of privacy).

In addition to Privacy Act protection, FIPS 201-1 establishes detailed privacy requirements governing the collection and retention of information, including (1) the

assignment of a senior agency official to oversee privacy-related matters; (2) a Privacy Impact Assessment, ensuring that only personnel with a legitimate need for access to personal information are authorized to access this information; (3) continuous auditing of compliance; (4) use of an electromagnetically opaque sleeve or other technology to protect against any unauthorized contactless access to personal information; and (5) disclosure to applicants of the intended uses and privacy implications of the information submitted in order to obtain credentials. *See* FIPS 201-1, § 2.4. NASA also issued an Interim Directive augmenting NPR 1600.1, which details how "all [a]pplicants will have their information protected by applicable provision of the Privacy Act." The Privacy Act, FIPS 201-1, and NASA's Interim Directive ensure that collected information will not be disclosed to the public.

The panel, however, is concerned that Form 42's "open-ended questions appear to range far beyond the scope of the legitimate state interests that the government has proposed." *Nelson II,* 530 F.3d at 881. But an effective investigation of an applicant generally requires asking open-ended questions to allow investigators some flexibility to follow up on relevant leads. Instead, the panel's opinion would second-guess determinations regarding suitability for federal employment and the security of federal institutions that are best left to the Executive Branch.

In assessing whether NASA's actions are narrowly tailored, we look at the nature of the inquiry and ask whether it is an appropriate matter of inquiry based on the legitimate concerns raised by the government. *See Thorne,* 726 F.2d at 469. Form 42's questions to desig-

nated references are limited to "additional information which [they] feel may have a bearing on this person's suitability for government employment or a security clearance." In *American Federation of Government Employees,* the D.C. Circuit found a release form in a background investigation that authorized the government to collect "any information relating to my activities" sufficiently narrowly tailored because the Privacy Act limits the collection to "relevant" information in order to determine the fitness of an individual. 118 F.3d at 789, 794. The court observed that "the Privacy Act requires that an agency 'maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President.'" *Id.* at 794 (quoting 5 U.S.C. § 552a(e)(1)). The scope of Form 42's questions asking for information "bearing on this person's suitability for government employment or a security clearance" is similar to the release form in *American Federation of Government Employees.*

Finally, the panel concludes that the SF-85's request for disclosure of "any treatment or counseling received for illegal drug use would presumably lessen the government's concerns regarding the underlying activity," and thus, does not sufficiently demonstrate a legitimate state interest. *Nelson II,* 530 F.3d at 879. As discussed above, a government worker's drug use history cannot be kept from the government. *See Nat'l Treasury Employees Union,* 25 F.3d at 243. If a government worker's illegal drug use history is not entitled to constitutional protection, as the panel agrees, I do not see how a question regarding whether the applicant has received any treatment or counseling does not concern a legiti-

mate state interest, especially when it provides a more complete picture of an applicant's acknowledged drug use history. Of course, successful counseling might alleviate security concerns, but this supports rather than detracts from the inquiry's relevance and legitimacy. Given that the government may legitimately inquire as to an employee's illegal drug use, it makes little sense to prohibit the government from asking about an employee's treatment or counseling for drug use, which is necessary for a complete evaluation of the effect of the employee's drug use. The panel's opinion draws an arbitrary line, one which severely hampers the government's ability to secure its facilities.

III. Conclusion

The panel's opinion sharply curtails the degree to which the government can protect the safety and security of federal facilities. It significantly expands the constitutional right to informational privacy and puts the Ninth Circuit at odds with other circuits that have considered the right to informational privacy with respect to personnel background investigations. For these reasons, I respectfully dissent from the denial of rehearing en banc.

KLEINFELD, Circuit Judge, with whom CALLAHAN and BEA, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I join in Judge Callahan's dissent from denial of rehearing en banc. Judge Callahan focuses on the drug treatment question and other inquiries to the applicant. I write to supplement her discussion of the other government conduct the panel held likely to be unconstitu-

tional—the inquiries to references, past employers, landlords, and schools.

The panel characterizes as "the most problematic aspect of the government's investigation—the open-ended Form 42 inquiries."[1] Almost 1,000,000 of these inquiries are sent out every year, not just for people applying for jobs at the Jet Propulsion Lab managing space missions and protecting national security on secret space matters, but also for most other government jobs.[2] The panel opinion is likely to impair national security by enjoining reasonable reference checks on applicants for federal government functions. The panel's injunction failed to consider this public interest factor, contrary to the Supreme Court's recent admonition that "*consideration of the public interest*" is mandatory "in assessing the propriety of any injunctive relief."[3]

The panel forbids the government from making the inquiries it has been making for decades, and from doing what any sensible private employer would do.[4] The pan-

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[1] *Nelson v. NASA*, 530 F.3d 865, 877 (9th Cir. 2008).

[2] *See* Exec. Order No. 10,450, § 3(a), 18 Fed. Reg. 2489 (Apr. 29, 1953), *reprinted as amended in* 5 U.S.C. § 7311 app. at 78 (2006) ("The appointment of each civilian officer or employee *in any department or agency of the Government* shall be made subject to. . . . [I]n no event shall the investigation include less than . . . written inquiries to . . . former employers and supervisors, references, and schools attended by the person under investigation.") (emphasis added); Submission for OMB Review, 70 Fed. Reg. 61,320, 61,320 (Oct. 21, 2005) ("Approximately 980,000 INV 42 inquiries are sent to individuals annually. The INV 42 takes approximately five minutes to complete.").

[3] *Winter v. NRDC,* — U.S. —, 129 S. Ct. 365, 381, 172 L. Ed. 2d 249 (2008), *rev'g* 518 F.3d 658 (9th Cir.) (emphasis added).

[4] Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 29, 1953), *reprinted as amended in* 5 U.S.C. § 7311 app. at 77-80 (2006).

el's concern is that the "open-ended questions"—any adverse information regarding financial integrity, drug and alcohol abuse, mental and emotional stability, general behavior and conduct, and other matters—go beyond the government's legitimate security needs. The panel says that "highly personal information" is likely to come back when this form is sent to references, former employers, and landlords.[5] I disagree. What these categories of people know ought to be subject to inquiry.

First, what would references, past employers, and landlords know that is too "highly personal" for the government to know when it is hiring someone?[6] There is no citation for the panel's claim that "[t]he highly personal information that the government seeks to uncover through the Form 42 inquiries is protected by the right to privacy, whether it is obtained from third parties or from the applicant directly."[7] A landlord, unlike a doctor or lawyer, does not obtain genuinely private medical or legal confidences, after all. That is why past employers, unlike doctors or lawyers, have a privilege in defamation and invasion of privacy law.[8] A past employer can (and should) tell a prospective employer if the applicant stole money, came in late and hungover on Mondays, or wound up in jail after a drug bust, yet the ma-

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[5] *Nelson,* 530 F.3d at 879-82.

[6] *See United States v. Jacobsen,* 466 U.S. 109, 117, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984) ("[W]hen an individual reveals private information to another, he assumes the risk that his confidant will reveal that information. . . . ").

[7] *Nelson,* 530 F.3d at 880 n.5.

[8] *See* Restatement (Second) of Torts, § 652G (1977); *id.* § 595 cmt.i (noting conditional privilege to make a defamatory statement regarding former employee, despite any putative invasion of privacy).

jority would treat this as a secret not to be disclosed to the Jet Propulsion Lab or any government agency hiring for a civil service position.

Other circuits have rejected the panel's position. The District of Columbia Circuit held that collection of information does not raise the concerns that dissemination would, noting that "the employees could cite no case in which a court has found a violation of the constitutional right to privacy where the government has *collected*, but not *disseminated*, the information."[9] Likewise the Fifth Circuit.[10] This case concerns only collection of information, not dissemination.

The panel appears to be especially concerned with the "open-ended" inquiry into "any other adverse matters." The panel cites no authority, and gives no good reason, for rejecting these inquiries. When a prospective employer calls a past employer, it is exceedingly difficult to find out bad things, because people usually do not like to allege them without absolute proof (and because of potential liability and retaliation). The prospective employer does not know what bad things to ask about until something comes up in response to the open-ended questions. The prospective employer must smoke out negative information with open-ended broad questions and is lucky to get a glimmer. The answers to

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[9] *Am. Fed. of Gov't Employees v. HUD*, 118 F.3d 786, 793 (D.C. Cir. 1997) (emphasis added).

[10] *Nat'l Treasury Employees Union v. U.S. Dep't of Treasury*, 25 F.3d 237, 244 (5th Cir. 1994) ("[G]iven that the information collected by the questionnaire will not be *publicly disclosed*, we hold that the individual employees represented in the present case have no reasonable expectation that they can keep confidential from their government employer the information requested. . . . ") (emphasis added).

open-ended questions are not infrequently revelatory and surprising.[11]

Most of us do not hire law clerks and secretaries without talking to professors and past employers and asking some general questions about what they are like. It is hard to imagine an espresso stand hiring a barista without some open-ended questions to throw light on his reliability, honesty with cash, customer service, and ability to get along with coworkers and supervisors. I doubt if a person cleaning homes for a living hires an assistant without first finding out something about the assistant. Without open-ended questions, it is hard to know what potential problems might need an explanation. Of course some answers will be irrelevant or silly. But without the open-ended questions, any employer gets stuck with people who should not have been hired, and even, occasionally, people who are dangerous.

Under the panel opinion, our federal government cannot exercise the reasonable care an espresso stand or clothing store exercises when hiring. No revival of McCarthyism is threatened by allowing as much inquiry for hiring a Jet Propulsion Lab engineer as a barista.

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[11] None more so than *People v. Hill,* 70 Cal. 2d 678, 76 Cal. Rptr. 225, 452 P.2d 329, 337 (1969), where an interviewee answered the question "is there anything else you want to tell us" by admitting a previous burglary, which made him a suspect, later convicted, in a home-invasion murder. *See also* Shannon Dininny, *Washington Prepares for First Execution since 2001,* Associated Press, Mar. 9, 2009 (suspect in a California attempted murder answers the same question by admitting a murder in Washington, for which he was later convicted and currently faces the death penalty); *cf. United States v. King,* 34 C.M.R. 7, 9, 1963 WL 4749 (C.M.A. 1963) ("The Air Policeman 'more or less' found out 'what the story was' when he asked King if there was 'anything you want to tell me.'").

Chief Judge KOZINSKI, with whom Judges KLEINFELD and BEA join, dissenting from the denial of rehearing en banc:

Is there a constitutional right to informational privacy? Thirty-two Terms ago, the Supreme Court hinted that there might be and has never said another word about it. *See Whalen v. Roe,* 429 U.S. 589, 599, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977) (alluding to "the individual interest in avoiding disclosure of personal matters"), and *Nixon v. Administrator of General Services,* 433 U.S. 425, 457, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977) (quoting the above phrase from *Whalen*). With no Supreme Court guidance except this opaque fragment, the courts of appeals have been left to develop the contours of this free-floating privacy guarantee on their own. It's a bit like building a dinosaur from a jawbone or a skull fragment, and the result looks more like a turducken. We have a grab-bag of cases on specific issues, but no theory as to what this right (if it exists) is all about. The result in each case seems to turn more on instinct than on any overarching principle.

One important function of the en banc process is to synthesize the accumulated experience of panels into firmer guideposts. We ought to have taken this case en banc for precisely that reason. Unless and until the Supreme Court again weighs in on this topic, only an en banc court can trim the hedges, correct what now appear to be missteps and give the force of law to those distinctions that experience has revealed to be important.

1. One such distinction is between mere government *collection* of information and the government's *disclo-*

sure of private information to the public. *Whalen* involved the latter: patients who feared public disclosure of their prescription records. Many of the cases in our circuit fall into this mold. In *Tucson Woman's Clinic v. Eden*, we held that women had a right not to have the government disclose their pregnancy records to a third-party contractor. 379 F.3d 531, 553 (9th Cir. 2004). *In re Crawford* featured a bankruptcy preparer who didn't want his Social Security number published. 194 F.3d 954 (9th Cir. 1999). But in other cases, such as the one now before us, we have sustained informational privacy claims without any allegations that the government might publish what it learned. *See, e.g., Norman-Bloodsaw v. Lawrence Berkeley Laboratory,* 135 F.3d 1260 (9th Cir. 1998).

The distinction matters. Government acquisition of information is already regulated by express constitutional provisions, particularly those in the Fourth, Fifth and Sixth Amendments. How can the creation of new constitutional constraints be squared with the teachings of *Medina v. California*, which cautioned against discovering protections in the Due Process Clause in areas where the "Bill of Rights speaks in explicit terms"? 505 U.S. 437, 443, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). Our cases, including this one, neither address nor acknowledge this problem. Yet limiting the government's ability to gather information has very serious implications, as Judge Callahan's dissent illustrates.

2. There's also an important distinction between disclosures that the target may refuse and those imposed regardless of his consent. The latter is inherently more invasive. *Nixon* is instructive: There, the former president was required by law to submit his papers for

screening by the National Archives. This requirement wasn't imposed as a condition on some benefit or job opportunity; rather, it was imposed outright under penalty of law. 433 U.S. at 429, 97 S. Ct. 2777. Though Nixon was unsuccessful, it wasn't because his claim wasn't found to be cognizable; the public interest was held to outweigh his privacy. In *Whalen,* the only way for the patients to avoid having their prescription records turned over was to give up needed pharmaceuticals. Our cases sometimes fit comfortably in this mold: What was so creepy about the medical tests in *Norman-Bloodsaw,* for example, was the sneaky way they were done without the subjects' knowledge or consent. 135 F.3d at 1269.

It strikes me as quite a different case when the government seeks to collect information directly from persons who are free to say no. The plaintiffs here had a simple way to keep their private dealings private: They could have declined to fill out the forms, provided no references and sought other employment. Does being asked to disclose information one would prefer to keep private, in order to keep a government job to which one has no particular entitlement, amount to a constitutional violation? If the answer is yes, then the government commits all manner of constitutional violations on tax returns, government contract bids, loan qualification forms, and thousands of job applications that are routinely filled out every day.

3. There is also a distinction, recognized by some of our sister circuits, between information that pertains to a fundamental right, such as the right to an abortion or contraception, *see, e.g., Bloch v. Ribar,* 156 F.3d 673, 684 (6th Cir. 1998), and a free-standing right not to have the world know bad things about you. The former kind of

right seems to stand on far sounder constitutional footing than the latter.

4. Consider also the contrast between investigating a subject by digging through his bank records or medical files, and contacting third parties to find out what they know about him. One's pregnancy status (perhaps known to no one), as in *Norman-Bloodsaw,* or the need for certain pharmaceuticals, as in *Whalen,* is private precisely because one has been careful not to disclose it. But one's privacy interest ought to wane the more widely the information is known. The Supreme Court has made a related point about the Fourth Amendment: Individuals lack a reasonable expectation of privacy in information that they share voluntarily with others. *See United States v. Miller,* 425 U.S. 435, 443, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976).

Does one really have a free-standing constitutional right to withhold from the government information that others in the community are aware of? I don't think so. How then can it be constitutionally impermissible for the government to ask a subject's friends, family and neighbors what they know about him? Surely there's no constitutional right to have the state be the last to know.

5. A final distinction that emerges from the cases is between the government's different functions as enforcer of the laws and as employer. In *Whalen,* the government was acting as the former, collecting prescription records to aid later investigation of unlawful distribution. 429 U.S. at 591-92, 97 S. Ct. 869. Similarly, in *Tucson Woman's Clinic*, the government was ostensibly scooping up patient information to protect the public health. 379 F.3d at 536-37. Here, as Judge Kleinfeld illustrates in his dissent, the government is simply acting

as any other employer might: collecting information for its own purposes to make employment decisions.

If a right to informational privacy exists at all, *but see American Federation of Government Emp., AFL-CIO v. Department of Housing and Urban Development*, 118 F.3d 786, 791, 793 (D.C. Cir. 1997), it would be far more likely to apply when the government is exercising its sovereign authority than when it is monitoring its own employees.

While I can think of many reasons to worry when the government seeks to uncover private information using the special powers that private entities lack, it's far less obvious why it should be hamstrung in ensuring the security and integrity of its operations in ways that private employers are not. The delicate knowledge handled by thousands of federal employees seems as worthy of protection as the formula for Coca-Cola.

* * *

As we have recognized elsewhere, there are circumstances when a well-worn doctrine can grow into "a vexing thicket of precedent" that then becomes "difficult for litigants to follow and for district courts—and ourselves—to apply with consistency." *United States v. Heredia*, 483 F.3d 913, 919 (9th Cir. 2007) (en banc). The back-and-forth between the panel and my dissenting colleagues illustrates that we have reached this point with the doctrine of informational privacy. Though I am sympathetic to the arguments of my dissenting colleagues, it's not clear that the panel has misapplied circuit law; when the law is so subjective and amorphous, it's difficult to know exactly what a misapplication might look like.

It's time to clear the brush. An en banc court is the only practical way we have to do it. We didn't undertake that chore today, but we'll have to sooner or later, unless the Supreme Court should intervene.

APPENDIX F

The Privacy Act, 5 U.S.C. 552a, provides, in pertinent part:

Records maintained on individuals

(a) Definitions.—For purposes of this section—

* * * * *

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

* * * * *

(b) Conditions of disclosure.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is

transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

* * * * *

(d) Access to records.—Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements.—Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

* * * * *

(f) Agency rules.—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

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APPENDIX G

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